SUPREME COURT, U.S.

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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1048

BORG-WARNER CORPORATION, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Borg-Warner Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause on September 23, 1970 affirming the judgment of conviction against Borg-Warner Corporation in the United States District Court, for the Western District of Pennsylvania.

OPINIONS BELOW

No opinion was written by the District Court when it entered a judgment of conviction on the jury verdict. The majority and dissenting opinions of the Court of Appeals for the Third Circuit affirming the judgment of the District Court are unreported and are printed in Appendix A hereto.

JURISDICTION

The United States District Court for the Western District of Pennsylvania entered judgment on the verdict of guilty on August 12, 1969. Appendix B. The judgment of the Court of Appeals for the Third Circuit, affirming the judgment below, was entered on September 23, 1970. Appendix B. A timely petition for Rehearing In Banc was denied on November 3, 1970. Appendix B. This Petition for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 22(2) of this Court.

QUESTIONS PRESENTED

I. Was Petitioner Denied Due Process of Law By the Following Conduct of the Prosecutor:

A. In That He Intentionally Failed To Disclose Information Favorable To Petitioner, Material To the Question of Guilt and Useful In the Preparation of a Defense?

B. In That His Improper Cross-Examination On An Irrelevant But Inflammatory Issue Had a Potential For Prejudice Which Far Outweighed Any Possible Evidentiary Value?

C. In That He Overstepped the Bounds of Propriety in His Closing in Personally Vouching For the Integrity of a Government Witness and In Implying the Existence of Damaging Evidence Outside the Record?

II. After Acknowledging the Existence of Numerous Trial Errors, May a Court of Appeals Neverthe-

lens Refuse to Reverse Because It Believes the Evidence of Guilt Offered by the Government Was Compelling?

III. Should This Court Exercise Its Power of Supervision and Reverse the Judgment in a Criminal Case Where the Trial Judge:

A. Made Evidentiary Rulings Which Were Erroneous, Restrictive and Incomprehensible?

B. Examined Witnesses In Prosecutor-Like Fashion?

C. Deprecated Defense Evidence and Abused and Belittled Defense Witnesses and Counsel?

D. Generally Misapprehended the Applicable Law and Failed To Preserve Defendants' Constitutional Rights?

IV. Was Petitioner Denied Its Sixth Amendment Right of Confrontation by the Admission of Hearsay Statements of a Non-Testifying Declarant Who Was Available to the Government?

V. Was Petitioner Deprived of the Presumption of Innocence When the Trial Judge Instructed the Jury That It Could Draw an Adverse Inference From Petitioner's Failure to Call Certain Witnesses When Petitioner Rested Its Case Without Calling Any Witnesses?

VI. Was Petitioner Denied Due Process of Law by the Part of the Charge Which Stated "The Things the Defendants Did and Said at the Time May . . . Be Weightier Than the Things They Say Thereafter."?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Antitrust Laws, Title 15 U.S.C., Chapters 1 and 2 (15 U.S.C. §§1-58), the pertinent section of which is:

> §1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

2. Constitutional Amendment V (U.S.C. Const. Amend. 5) which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Constitutional Amendment VI (U.S.C. Const. Amend. 6) which provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accu-

nation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was indicted on October 6, 1966, under §1 of the Sherman Antitrust Act, 15 U.S.C. §1. On January 13, 1969 petitioner, American Standard, Inc., Kohler Co. and three individual defendants were brought to trial. The prosecution called ten witnesses and rested its case on February 19, 1969. The other defendants called twenty-one witnesses and rested on April 23, 1969. Petitioner offered no testimony and called no witnesses. On May 2, 1969, the jury returned verdicts of guilty against all defendants. The District Court entered judgment on the verdicts on August 12, 1969. Petitioner appealed and the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court on September 23, 1970 and denied Petitioner's timely Petition for Rehearing on November 3, 1970.

Petitioner, six other plumbing fixture manufacturers, seven individuals and a trade association were charged in the one-count indictment with engaging in an unlawful combination and conspiracy consisting of a continuing agreement to raise, fix, stabilize and maintain prices of plumbing fixtures. The Government offered proof concerning four separate instances wherein the conspirators purportedly entered into agreements:

Statement of the Case.

1. An agreement to increase prices of enameled cast iron bathtubs in October of 1962.

2. An agreement to maintain and increase the prices of vitreous china plumbing fixtures in January, 1963.

3. An agreement to limit maximum discounts from wholesaler net prices in February, 1963.

4. An agreement to eliminate regular enameled cast iron plumbing fixtures and to increase the price of acid resistant fixtures in July, 1963.

The Petitioner was the only defendant which did not publish wholesaler net prices, the only defendant against which there was absolutely no testimony concerning discounts, and the only defendant whose employee (Government Witness Vereeke) testified without contradiction by any other witness or document that he personally established prices and never discussed prices with any competitor. Furthermore, Borg-Warner was the only defendant (as stipulated by the government) which did not stop producing regular enameled cast iron fixtures during the period covered by the Indictment.

The only employee of Borg-Warner present at any gathering of competitors during the relevant period was George W. Kelch who left Borg-Warner in December 1964. Mr. Kelch, who was indicted and pleaded nolo contendere, was not called as a witness by the Government. No explanation for the Government's failure to call Mr. Kelch appears in the record.

REASONS FOR GRANTING THE WRIT

I. (A) Petitioner Was Denied Due Process of Law by the Failure of the Prosecutor to Disclose Information Favorable to Petitioner, Material to the Question of Its Guilt and Useful in the Preparation of Its Defense. The Decision of the Court of Appeals, Which Approved the Prosecutor's Failure, Conflicts With the Decisions of This Court and Other Courts of Appeal.

This Court has not dealt with the duty of disclosure of a prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963), since its 1966 decision in *Giles v. Maryland*, 386 U.S. 66. However, there has developed in the lower courts further elaboration of the *Brady* doctrine. The Court below disregarded not only the standards developed by other circuits, but it also disregarded the principles established by this Court in *Brady*.

Petitioner moved, prior to and during trial, for production of all material required under *Brady* but was advised by the prosecutor that no such material existed. Yet, well after the jury verdict — indeed subsequent even to the filing of Petitioner's brief with the Third Circuit —the Government, under compulsion, disgorged two sets of material which it quite clearly should have disclosed prior to trial, or at least immediately after it closed its direct case under the doctrine of *Brady*. These *Brady* materials were the Grand Jury testimony of Raymond A. Pape and the pretrial statements of William E. Kramer.

Raymond A. Pape, formerly Vice-President of defendant Crane Co.'s Plumbing, Heating and Air Conditioning Group, was not called to testify by the Govern-

ment even though he was available. However, Pape was a dramatically critical figure in the trial. The crux of the Government's case lay with a series of six pages of undated and unsigned handwritten notes. These notes contained what the Government claimed were the figures and statements on an unpublished American Standard worksheet. The notes were admitted on the basis of the testimony of Pape's former secretary that the handwriting "appears to be" or "resembles" Pape's. The Government offered no evidence as to the time, place or circumstances of their making.

If, as the Government vehemently urged the jury to believe, the notes were made by Pape at a meeting of all defendants at the Palm Beach Biltmore the notes would have been, as the prosecutor argued, one of the ". . . most incriminating documents" in evidence. Indeed, the prosecutor asserted to the jury that these notes were in fact "in a written form the illegal agreement . . . ." On the other hand, if the notes were made elsewhere than at the Palm Beach Biltmore gathering or reflected only a conversation between Pape and an American Standard employee, then they had absolutely no probative value as against Borg-Warner.

Given this setting the Government's intentional suppression of the contents of Pape's Grand Jury testimony is a flagrant violation of the standards established by this Court in *Brady v. Maryland, supra.* Pape stated before the Grand Jury with respect to the notes: "I don't know where they came from or where they were made;" "I really don't recall a meeting where we sat around and agreed on a price;" "I didn't know where [the notes] came from, whether they came from a meeting, a telephone conversation or what." More-

over, Pape insisted that while he continually tried to discover what American Standard intended to do he could recall no agreement of the manufacturers on prices to be charged. Indeed, Pape testified before the Grand Jury that he could never be sure about what prices Borg-Warner did or was going to charge.

The Court of Appeals concluded that, "on the whole, Pape's Grand Jury testimony was extremely incriminating and we cannot say that it contained any material exculpatory evidence." (Appendix A, *Infra.*, p. 54a) This conclusion overlooks the fact that as to this Petitioner it was anything but "extremely incriminating," and even if "incriminating on the whole", it contained material which would have been extremely useful to Borg-Warner in the preparation of its defense. Had Borg-Warner been aware of Pape's Grand Jury testimony or even of his views as to Borg-Warner's non-complicity, it could have shown that what the Government called one of the "two most incriminating documents" in evidence had no connection to Borg-Warner whatsoever.

William E. Kramer was the secretary of the trade association until he absconded with more than $200,000 of its funds in 1963, and was named by the Government as an alleged co-conspirator. Kramer testified on behalf of the Government concerning meetings of the PFMA, the names of the attendees and the fact that when he left the meetings the members were talking together. Subsequent to trial, during the deposition of Kramer taken in private treble damage actions, Kramer testified concerning approximately 37 written statements he had tendered to assist the Government prior to trial. The defendants filed a motion in the Court of

Appeals seeking to compel the Government to give them copies of these documents and to make them part of the record. By Order of April 21, 1970, the Court of Appeals directed the Government to produce the documents not otherwise available for *in camera* inspection by that Court. The Goverment produced 16 documents pursuant to that Order and represented that four of the documents requested by the defendants were not in its files. The Court of Appeals examined these documents *in camera*. Counsel for the Petitioner is unaware of the contents of these 16 documents. The Court of Appeals reported that "we have carefully examined all of the Kraemer [sic] statements. Most of them contain material that is exceptionally damaging to defendants. We have found no material exculpatory evidence in any of the statements." (Appendix A, *infra*., p. 55a) The Court of Appeals then concluded that Petitioner was not entitled to inspect the Kramer statements and therefore denied its motion to have the Kramer statements produced. The Court's holding in this regard is contrary to both *Brady v. Maryland*, 373 U.S. 83 (1963), and the *Jencks Act*, 18 U.S.C. §3500.

It is submitted that the decision of the Court below flies in the face of the development of the *Brady* doctrine in other circuits and is contrary to the principles enunciated by the Court. The Second Circuit has stated that the prejudice to the defendant is "measured by the effect upon defendants' preparation for trial, rather than its effect upon the jury verdict" and that speculation that the evidence if not suppressed "probably would not have produced a different verdict" is not the deciding factor. *United States v. Polisi*, 416 F.2d 573, 577-78

(1969). Moreover, the decision as to whether, on the balance, the testimony as a whole is helpful or harmful in a court's eyes, is really immaterial. As the Fourth Circuit has recognized, this is essentially a matter for defense counsel, not the court or prosecution. *Barbee v. Warden*, 331 F.2d 842, 845 (4th Cir. 1964); *cf., Alderman v. United States*, 394 U.S. 165 (1969). *See also, Luna v. Beto*, 391 F.2d 329 (5th Cir. 1967); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *Levin v. Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966).

It is of great importance that the role of the prosecutor be clarified in this regard both in order to resolve the conflict between the Circuits and as a matter of sound administration of federal criminal justice. Further, the holding of the Court below, if not corrected by this Court, threatens to erode the essential protections preserved by this Court in *Brady*.

I. (B) This Court Should Grant the Writ Because the Prosecutor's Improper Cross Examination About the Kohler Strike So Prejudiced the Petitioner in the Eyes of the Jury That Petitioner Was Denied Due Process of Law.

During the cross-examination of defendant Norman Held, a Kohler Co. employee, called as a witness by Kohler, the prosecutor injected an extended, hour-long barrage of irrelevant and inflammatory questions concerning "Kohler's purchase of guns, ammunition and teargas, eviction of strikers, investigating the private lives of union officials and other inflammatory topics." See Dissenting Opinion, Appendix A, *infra.*, p. 67a. This explosive examination continued in spite of the fact that the witness denied personal knowledge of any of

the matters raised by the prosecutor concerning the Kohler strike. A portion of this highly improper examination is set forth in Judge Aldisert's dissenting Opinion, Appendix A, *infra*., pp. 68a-71a.

Kohler and Norman Held were named as co-defendants and co-conspirators of this Petitioner. Borg-Warner could logically be convicted only if there were a finding of a conspiracy to which Kohler, the second largest manufacturer in the industry, was a party. An examination so prejudicial as to divert a jury from the merits of the charges against Kohler must of necessity have prejudiced this Petitioner as well. Even the majority below recognized that the examination's "potential for prejudice outweighed its evidentiary value." As to Borg-Warner it had absolutely no evidentiary value. Petitioner, who had not "opened the door," was forced to sit by helplessly while the prosecutor, for no probative reason, injected the long series of labor-baiting activities into an antitrust proceeding in Western Pennsylvania, a community, in the words of Judge Aldisert, "historically and currently the center of organized labor activity." As stated by Judge Aldisert in his dissent, "For the Government to perpetrate and prolongate this slashing examination and then say that it had 'absolutely nothing to do with any charge of the Indictment' raises the serious question of the very real purpose of the examination." Appendix A, *infra*, p. 70a.

The Opinion of the Court which acknowledged the error and then ignored its prejudicial effect now stands as a license to prosecutors to inject into criminal conspiracy proceedings extended inflammatory references to matters having no connection with a co-defendant and which are immaterial to the charges solely to pre-

judice the jury. Such conduct by a prosecutor is a denial of due process. This Court should grant the Writ to review and condemn such conduct.

I. (C) The Writ Should Be Granted Because the Prosecutor Overstepped the Bounds of Propriety in His Closing Particularly in Personally Vouching For the Integrity of a Government Witness and Implying the Existence of Damaging Evidence Outside the Record Thereby Denying Petitioner Due Process of Law.

The Court of Appeals acknowledged:

> "Certainly the prosecutor did overstep the bounds of propriety in a few instances in the course of his five hour closing, particularly in appearing to personally vouch for the integrity of a government witness and in implying the existence of damaging evidence outside the record." Appendix A, *infra*, p. 29a-30a.

The Court forgives these prosecutorial aberrations on the theory that they were not ". . . so prejudicial to defendants that they were deprived of a fair trial." *Id.*

To permit a prosecutor to vouch for a Government witness clearly denies the defendant a fair trial, and no instruction can overcome the prejudice resulting therefrom. This is especially true when the witness involved is testifying as an expert on behalf of the Government. Furthermore, when a prosecutor seeks a conviction by asking the jury to infer that there is evidence of guilt which the Government did not or could not offer at trial he has reached beyond permissible limits. A defendant who must convince the jury that the evidence which was not offered is an insufficient basis for conviction faces

an insurmountable obstacle. If a prosecutor is permitted to suggest to the jury that there is damaging evidence not on the record and then acknowledge his error and ask the Court for an instruction "correcting it," then no defendant can expect due process of law. This Court should grant the Writ to review the prosecutor's conduct and to provide the Federal courts with standards of conduct beyond which no prosecutor, however eagerly he seeks a conviction, will be permitted to go.

II.

This Court Should Grant the Writ to Review the Decision of the Court of Appeals Because the Court of Appeals so Far Departed From the Accepted and Usual Course of Appellate Review and so Far Sanctioned the Improper Conduct of the Trial Judge as to Call for an Exercise of This Court's Power of Supervision.

The Court of Appeals overlooked the cumulative prejudicial effect of the following conduct in the trial below referred to in its opinion:

> 1. "Certainly the trial judge was testy on occasion and certainly the reasons given for some of his rulings left something to be desired." Appendix A, *infra*, p. 23a.
>
> 2. "The emotional nature of some of the cross-examination on this subject matter [Kohler Labor Practices] may have tended to temporarily divert the jury from passing on the merits of the criminal charges, at least as to Kohler and Held . . . we think the judge should have terminated the line of questioning. We think its potential for prejudice out-

weighed its evidentiary value . . . ." Appendix A, *infra.* p. 27a.

3. ". . . Certainly the prosecutor did overstep the bounds of propriety in a few instances in the course of his five hour closing, particularly in appearing to personally vouch for the integrity of a government witness and in implying the existence of damaging evidence outside the record. . . ." Appendix A, *infra.* pp. 29a-30a.

4. ". . . . the admission of hearsay statements of nontestifying declarants did not affect the outcome of the case . . . ." Appendix A, *infra.* p. 38a.

5. ". . . we have no doubt that in this case evidence [which evidence was excluded by the trial judge] of the preceding two years and of the year following the end of the alleged conspiracy would not have suffered from that defect [the defect ascribed to it by the trial judge] . . . ." Appendix A, *infra.* p. 41a.

6. ". . . We are convinced from our reading of the record that the letter [from an official of the Commerce Department] ought to have been admitted . . . the court erroneously excluded this exhibit." Appendix A, *infra.* p. 45a.

7. ". . . we think the better procedure would have been to cover the names [on the Indictment of defendants not on trial] when defendants so requested . . . ." Appendix A, *infra.* p. 51a.

8. ". . .the government's failure to produce the document which related to Kraemer's [sic]

testimony was harmless error." Appendix A, *infra*, p. 58a.

The cumulative effect of (1) a trial judge who became testy and gave vague rulings, (2) cross examination wherein the potential for prejudice outweighed the evidentiary value, (3) prosecutorial overreaching, (4) the minimum of hearsay, (5) the exclusion of economic and other defense evidence and (6) the disregard of the Government's failure to produce evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), can under no circumstances be said to be harmless error.

In the case at bar the Court of Appeals refused to reverse for the trial error which it found in the following language:

> "The government's evidence of price fixing by the appellants was compelling. We note in conclusion that the government presented eyewitnesses and co-conspirators who clearly implicated appellants in the crime and largely corroborated one another. As to all appellants but Decker, we have concluded that there is strong evidence of their participation in all four phases of the conspiracy. When it is remembered that evidence of a defendant's participation in any one phase of the conspiracy was sufficient for a conviction under the one-count indictment, it becomes clear that the cumulative effect of the government's case was overwhelming. As to appellant Decker, there was clear and convincing evidence of his participation in the fourth phase of the conspiracy.
>
> "It is true that we have found errors in a few instances but appellants are not entitled to hind-

> sight perfection. Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction was entirely warranted from the evidence." Appendix A, *infra.*, pp. 65a-66a.

In other words, the Court of Appeals evaluated the prejudicial effect of the admitted trial errors only in the light of its own conclusion that the government's evidence was compelling. The Court's conclusion stated at the beginning and repeated at the end of its opinion that the government's evidence was compelling was the Court's justification for disregarding the errors which occurred in the trial. The petitioner was not asking for "hindsight perfection" but merely the same right to a fair trial as any other criminal defendant. No defendant's right to a fair trial or due process of law should be diluted by an appellate court's opinion concerning the innocence or guilt of such defendant. The prejudicial effect of trial error should not be evaluated only in the light of an appellate court's opinion of the quality and quantity of the government's evidence.

It is respectfully submitted that this Court should grant the Writ for the reason that the United States Court of Appeals for the Third Circuit completely misapprehended its function when it evaluated Petitioner's right to a fair trial in the light of its own opinion that the government's case was "compelling".

III.

This Court Should Exercise Its Power of Supervision and Reverse the Judgment in This Case Because the Trial Judge (A) Made Evidentiary Rulings Which Were Erroneous, Restrictive and Incomprehensible: (B) Examined Witnesses in Prosecutor-Like Fashion, (C) Deprecated Defense Evidence, Abused and Belittled Defense Witnesses and Counsel and (D) Generally Misapprehended the Applicable Law and Failed Completely to Preserve Petitioner's Constitutional Rights.

From the outset of the trial, the judge evidenced an openly hostile attitude toward the defendants, their witnesses and even their counsel. Volume II of the Appendix certified to this Court contains more than 300 incidents which illustrate the objectionable nature of the judge's conduct (*See*, Appendix A *infra*, p. 22a). The incidents were so pervasive and frequent that they cumulatively resulted in your Petitioner being denied a fair trial. The Court of Appeals admitted that some of the incidents apparently arose from the judge's "understandable desire to keep the trial moving". The Court went on to say: "Certainly the trial judge was testy on occasion and certainly the reasons given for some of his rulings left something to be desired. But all of this must be kept in perspective. This was a long trial and in great measure involved an exceedingly technical subject. . . ." A long trial, indeed! It is respectfully submitted that a judge who became testy and whose rulings left something to be desired because of his own desire to get the trial over cannot be forgiven for this kind of conduct in a criminal case. The Court of Appeals speaks of fairness to the judge in pointing out that

appellant's objections lacked substance and were repetitive. In light of the trial judge's incomprehensible conduct, repetitive objections were not only to be expected but were essential if defendants were to get a fair trial. If, as the Court of Appeals speculated, the judge's numerous rulings "created the false impression that judicial objectivity was lacking," perhaps that same false impression was created with the jury who convicted your Petitioner. The position taken by the Court of Appeals that because of the length of trial and the strength of the government's evidence all error will be forgiven is completely incompatible with even minimal protection of your Petitioner's constitutional right to a fair trial and due process of law.

It is respectfully submitted that the rationale of the Court of Appeals so far departs from the customary and usual course of appellate review as to require a reversal. Therefore, the Writ should be granted.

IV.

This Court Should Grant the Writ Because Petitioner Was Denied Its Sixth Amendment Right of Confrontation.

In this criminal case the Petitioner was denied its Sixth Amendment right of confrontation when the trial judge admitted six government exhibits which the government offered as evidence of an agreement to eliminate regular enameled fixtures and to fix acid resistant fixture prices. These six pages were undated, unsigned, handwritten notes on the stationery of the Hotel Corporation of America. As indicated at pages 7-11, *supra*, the reputed author of the notes denied that they were made in a meeting at which any representative of Petitioner was present. The trial judge admitted the notes in evidence on the testimony of a witness who purported to be familiar with the alleged declarant's handwriting. It is clear, as the Court of Appeals acknowledges, that the vast weight of authority requires that a trial judge determine whether the genuineness of the handwriting on a document to be used is sufficiently proved. Not unexpectedly, the trial judge gave no consideration to such evidentiary rule. The Court of Appeals concludes that if the trial judge had ruled properly, he could properly have submitted the question to the jury. This bit of sophistry misses the point. The Petitioner was confronted by six pieces of paper undated and unsigned which were offered into evidence as proof that an agreement had been reached in the presence of Petitioner's employees. The government submitted its case to the jury on that basis, knowing full well that the purported author of the documents denied that they were made in the presence of

any of Petitioner's employees. Had the trial judge followed the rules of evidence, and the Court of Appeals acknowledged he did not, Petitioner would have been confronted with the witness who purportedly wrote the document and would then have been in a position to prove unequivocally that the author of the documents denied that any employee of Petitioner was present at the time they were made. If Petitioner had any right of confrontation it clearly was denied by this ruling.

This conspiracy trial lacked even a semblance of attempting to protect each of the defendants individually. Counsel was helpless to correct the situation because of the trial judge's conduct, and the prosecutor, who had the option of calling the witness or introducing the hearsay evidence without the witness, chose the one way in which he could make certain that the true story did not surface during the course of the trial. On appeal, the prosecutor claimed to be solicitous for the welfare of the witness Pape whom he declined to call and yet he cross-examined for more than *nine days* another witness (defendant Quinn) who had even more serious health difficulties. Since the government had the option of confronting Petitioner with the witness and chose not to do so, it clearly and intentionally denied Petitioner its Sixth Amendment right of confrontation. It is respectfully submitted that such a denial cannot be excused under any circumstances, especially in a conspiracy trial. The Confrontation Clause requires the prosecutor to produce all available witnesses. A prosecutor's belatedly expressed opinion as to the witness's health cannot be controlling except to the extent that a prosecutor may choose not to offer the evidence at all. The prosecutor does not have the choice to deny any criminal defendant his constitutional right of confrontation.

V.

The Court of Appeals Erroneously Decided an Important Question of Constitutional Law Which Has Not Been Heretofore Settled But Should Be Settled by This Court, When It Held That It Is Proper for a Trial Judge to Direct the Jury That It May Draw Adverse Inferences From the Failure of a Criminal Defendant to Call Witnesses on Its Behalf Where Such Defendant Has Chosen to Put in No Case.

The Government's case against Borg-Warner was predicated on the presence of a Borg-Warner employee, George W. Kelch, at certain gatherings with competitors and the alleged subsequent uniformity of price moves. Kelch, who resigned from Borg-Warner in 1964, was not called as a witness. The prosecutor, early in his summation, argued strenuously and pointedly that the jury should draw an inference adverse to Borg-Warner on the basis of its failure to call Kelch as a witness. Indeed, the prosecutor even described Kelch physically to the jury — a description based solely on his personal knowledge, not the record. This argument was then underscored when the trial judge, in spite of the fact that no such instruction was requested, charged the jury that,

> "Where a party, without satisfactory explanation, fails to call a witness, who is known to that party, who has knowledge of material facts and whose interest or prejudice is in favor of such party, or would likely be in favor of such party, the inference is that his or her testimony would not sustain the contention of the party, if the witness were called. Also, where evidence which would be prop-

> erly part of a case, is within the control of one party or the other, whose interest would naturally be to produce it, and without satisfactory explanation, the party fails to do so, the jury may draw an inference that the evidence would be unfavorable, if that evidence was presented at the trial. If the testimony of the witness or the evidence would be merely cumulative, these rules would not apply. So, too, where witnesses are callable and evidence producible by any party, these rules do not apply.
>
> "Now, whether you apply these rules depends upon what you find the facts to be."

Counsel for Borg-Warner took exception to this charge and urged the court that in view of the fact that Borg-Warner had put in no case it should be specifically excluded from such instruction. The judge refused to charge the jury further.

The Court of Appeals dismissed Borg-Warner's arguments on appeal in this regard for two stated reasons: First, "The short answer to this claim is that a missing witness charge has long been accepted as appropriate even in criminal cases. See *Graves v. United States*, 150 U.S. 118, 121 (1893)." Appendix A, *infra*. p. 64a. Secondly, the Court reasoned that Borg-Warner's counsel had opened the door to such a charge by arguing that the failure of the Government to call another Borg-Warner employee raised inferences unfavorable to the Government.

The language in *Graves* relied on by the Court below is the following:

"The rule even in criminal cases is that if a party

> has peculiarly within his power to produce witnesses whose testimony would elucidate the transactions, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." 150 U.S. at 121.

However, neither *Graves* nor any other decision of this Court has condoned such a charge where, as here, a criminal defendant exercised its constitutional prerogative to call no witnesses on its behalf. Indeed, in *Graves*, the prosecutor had commented on the defendant's failure to call his wife as witness on his behalf, when, under the law of that day, she would have been incompetent to testify. The holding was that such comment was improper and reversible error. Moreover, in *Graves*, the defendant had called other witnesses in his behalf.

There was evidence before the jury that Kelch, one of the missing witnesses, was present at some of the very gatherings charged by the government to be conspiratorial. Who better to prove or disapprove the ultimate issue in the case as to Borg-Warner? And yet, on this, the critical issue on which the government had the burden of proof, the judge was, under the Court of Appeal's holding, entitled to advise the jury that "the inference is" that Kelch's testimony would be unfavorable to the party to which he was "available." Under the facts of this case, if the jury believed, as indeed they were directed to believe, that Kelch's testimony "would not sustain the contention" of Borg-Warner, it must inevitably have believed Borg-Warner to be guilty, whether supported by evidence of record or not.

In his closing argument to the jury, counsel for Borg-Warner argued that Mr. Bair, a Borg-Warner em-

ployee, would have *corroborated* the testimony of Mr. Vereeke. Such a statement does not justify the Government argument or the Court's charge which allowed the jury to convict the petitioner on the possible existence of unfavorable evidence outside the record.

It is submitted that the use of the missing witness instruction against a defendant which has called no witnesses in effect directs the jury to infer the ultimate fact against that defendant. Such a direction in a criminal case is constitutionally impermissible and denies a defendant its presumption of innocence. See, *United States v. Pomano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965); *Morinette v. United States*, 342 U.S. 246 (1952); *Tot v. United States*, 319 U.S. 463 (1943). This court has repeatedly regarded the operation of the presumption of innocence in a criminal trial to be a part of procedural due process and thus constitutionally mandated. *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Cummings v. State of Missouri*, 4 Wall 277, 328 (1866). The operation of the missing witness charge on a defendant who has called no witnesses imposes an intolerable burden, and indeed negates the presumption of innocence.

VI.

This Court Should Grant the Writ to Resolve the Conflict Between the Third Circuit's Decision in the Instant case and the Decision of the United States Court of Appeals in the Second Circuit in United States of America v. Chas. Pfizer & Co. 426 F.2d 32, 40 (2nd Cir. 1970)

In his final charge to the jury, the trial judge stated that, "the things the defendants did and said at the time, may . . . be weighter than the things they say thereafter" and that "assertions of innocence by such officers may reflect partly legal as well as factual contentions."

The trial judge's charge deprecating the denials of guilt by the individual defendants was precisely the charge condemned by the Court of Appeals for the Second Circuit in *United States v. Chas. Pfizer & Co.*, 426 F.2d 32, 40 (2nd Cir. 1970). In the trial below and in *Pfizer*, officers of corporate defendants, asserted their innocence and testified specifically that particular subjects had not been discussed and that they had left meetings of competitors with no understandings of any sort on pricing. Again, as in the trial below, the *Pfizer* trial judge "instructed the jury that 'assertions of innocence by such officers may reflect partly legal as well as factual contentions', meaning that the officers might be using 'agreement' in an overly narrow sense." *Id.* To the Second Circuit, that charge nullified the testimony of defendant's officers and disregarded the outright denials of those witnesses. This error in the charge led the Second Circuit to order reversal. The Court of Appeals for the Third Circuit, on the other hand, found no error in giving this same charge in the case below.

Pfizer is indistinguishable from the instant case insofar as the charge in question is concerned. The language and the contexts of the charges are virtually identical. Indeed, the prejudicial impact was even greater in this case inasmuch as defendants' efforts to put forth an economic defense were substantially rebuffed by the trial judge. Their sole remaining chance was the direct testimony of those very persons who would know best what occurred at the gatherings in question.

The conflict in the Circuits as to the propriety of a charge such as was given in *Pfizer* and in the trial below should be resolved by this Court because of the critical impact of such an instruction on defendants in criminal antitrust trials, or, indeed, in any factually and legally complex criminal trial. In trials of such a nature the jury will quite often be buried in an avalanche of circumstantial evidence consisting of economic studies and charts, complex theories, and unfamiliar legal concepts. When this happens, there is a very real danger of obscuring the ultimate question — was there an agreement or understanding on pricing or not? Where the trial judge deprecates what is the most direct and strongest sort of testimony a defendant can offer in such a case, there is nothing a defendant can do by way of defense.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted in this case.

Respectfully submitted

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,182—18,187

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION; KOHLER CO.; CRANE CO.; WALLACE-MURRAY CORPORATION; UNIVERSAL-RUNDLE CORPORATION; RHEEM MANUFACTURING COMPANY; BORG-WARNER CORPORATION; BRIGGS MANUFACTURING COMPANY; PLUMBING FIXTURE MANUFACTURERS ASSOCIATION; JOSEPH J. DECKER; DANIEL J. QUINN; NORMAN R. HELD; ROBERT E. CASNER; JOHN B. BALMER; STANLEY S. BACKNER; ROBERT J. PIERSON, JR.; and GEORGE W. KELCH.

AMERICAN STANDARD, INC.,
Appellant in No. 18,182

KOHLER COMPANY,
Appellant in No. 18,183

BORG-WARNER CORPORATION,
Appellant in No. 18,184

JOSEPH J. DECKER,
Appellant in No. 18,185

DANIEL J. QUINN,
Appellant in No. 18,186

NORMAN R. HELD,
Appellant in No. 18,187

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 21, 1970 and May 22, 1970

Before SEITZ, ALDISERT, *Circuit Judges* and HIGGINBOTHAM, *District Judge*

Opinion of the Court

(Filed September 23, 1970)

SEITZ, *Circuit Judge:*

These are appeals from judgments of conviction entered after jury verdicts finding violations of section 1 of the Sherman Act, 15 U.S.C. §1, by appellants American Radiator & Standard Sanitary, Inc. (American Standard); Joseph J. Decker and Daniel J. Quinn, President and Vice President respectively of American Standard's Plumbing and Heating Division; Kohler Co. (Kohler); Norman R. Held, member of Kohler's board of directors and Sales Manager for Plumbing Fixtures; and Borg-Warner Corp. (Borg-Warner).

Appellants were indicted on October 6, 1966. Also indicted with appellants were five other plumbing fixture manufacturers, Crane Company (Crane), Universal-Rundle Corp. (Universal-Rundle), Rheem Manufacturing Co. (Rheem), Wallace-Murray Corp. (Wallace-Murray), and Briggs Manufacturing Company (Briggs); five other employees of corporate defendants, Robert E. Casner, Vice President & General Manager of Crane's Plumbing, Heating, Air Conditioning Group; John B. Balmer, President of Wallace-Murray; Stanley S. Backner, Universal-Rundle's Vice President for Marketing

until December 1963, and Executive Vice President of the Plumbing Fixtures Manufacturers Association thereafter; Robert J. Pierson, Jr., Vice-President for Marketing of Rheem's Home Products Division; George W. Kelch, President and General Manager of Borg-Warner's Intersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA). The one-court indictment charged that from September 1962 until sometime in 1966 the corporate and individual defendants, together with various unindicted co-conspirators, engaged in an unlawful combination and conspiracy consisting of "a continuing agreement, understanding and concert of action . . . to raise, fix, stabilize and maintain the prices of enameled cast iron and vitreous china plumbing fixtures" in violation of section 1 of the Sherman Act. The indictment further stated that:

> "13. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:
>
> "(a) Held Meetings at various times under the guise of so-called 'official' PFMA meetings and during conventions of plumbing fixtures distributors and wholesalers at hotels and clubs, including, among others Greater Pittsburgh Airport Hotel, Pittsburgh, Pennsylvania; Sheraton-Chicago Hotel, Chicago, Illinois; Shoreham Hotel, Washington, D. C.; The Americana of New York, New York, New York; The Waldorf-Astoria, New York, New York; Palm Beach Biltmore Hotel, Palm Beach, Florida; and Chicago Athletic Club, Chicago, Illi-

nois, at which times said defendants and co-conspirators:

"(i) agreed to increase prices of enameled cast iron and vitreous china plumbing fixtures;

"(ii) agreed to limitations on maximum discounts from published prices of enameled cast iron and vitreous china plumbing fixtures;

"(iii) confronted one another with reported deviations from agreed upon maximum discounts and published prices of enameled cast iron and vitreous china plumbing fixtures;

"(iv) agreed to discontinue the manufacture of regular enameled cast iron plumbing fixtures which were lower-priced than acid-resistant enameled cast iron plumbing fixtures; and

"(v) agreed to seek and to obtain, as part of the agreement to discontinue the manufacture of enameled cast iron plumbing fixtures, the revision of the Enameled Cast Iron Commercial Standard to provide for only acid-resistant enameled cast iron plumbing fixtures;

"(b) Published price announcements and price books increasing the prices of enameled cast iron and vitreous china plumbing fixtures in accordance with agreements reached;

"(c) Discontinued the manufacture of regular enameled cast iron plumbing fixtures in accordance with the agreements reached;

"(d) Telephoned and otherwise contacted one another between meetings concerning:

"(i) increased prices on vitreous china plumbing fixtures;

"(ii) reported deviations from agreed upon maximum discounts and published prices of enameled cast iron and vitreous china plumbing fixtures; and

"(iii) the discontinuation of the manufacture of regular enameled cast iron plumbing fixtures;

"(e) Used the office of Secretary of PFMA, among other things, to schedule and arrange for the aforesaid meetings, to maintain a line of communication between said defendants and co-conspirators and to co-ordinate the efforts of said defendants and co-conspirators in seeking and obtaining the revision of the aforesaid Enameled Cast Iron Commercial Standard."

The defendants named in the indictment that are not involved in this appeal entered pleas of *nolo contendere* in the fall of 1968 and were thereafter sentenced. Appellants entered pleas of not guilty, and their sixteen-week jury trial began on January 13, 1969. Their basic theory was that the price moves alleged to be the result of illegal agreements were in fact the result of the operation of ordinary economic forces in the market place. The government called ten witnesses and rested its case on February 19, 1969. Appellants Quinn, Decker, American-Standard, Held and Kohler presented a total of 21 witnesses and rested their cases on April 23, 1969. Appellant Borg-Warner elected not to introduce any testimony of its own although its counsel did cross-

examine witnesses and place some exhibits in evidence. The trial transcript consisted of 10,256 pages and more than 900 exhibits were introduced into evidence. The jury retired to deliberate on the afternoon of May 2, 1969, and at 10 p.m. returned guilty verdicts against all six appellants, and they were thereafter sentenced.

Appellants have filed a Joint Brief in this court advancing numerous grounds in support of their claim that all their convictions should be reversed. They argue that they were denied a fair trial because of the trial judge's excessive and partisan participation in the trial and by his erroneous evidentiary rulings; that they were substantially prejudiced and denied a fair trial by the improper and inflammatory conduct of the prosecuting attorneys; and that they were prejudiced by the trial judge's procedures in connection with the jury charge, errors in the charge, and the pressured submission of the case to the jury. In addition separate briefs have been filed by all appellants but American Standard. Each advances various individual grounds for reversal. Unlike appellants American Standard and Quinn, appellants Kohler, Held, Borg-Warner and Decker argue that because of the weakness of the government's case against them, their motions for judgment of acquittal should have been granted.

We will first deal with the arguments raised in appellants' Joint Brief and then examine those raised in the individual briefs. In order to evaluate the claim of appellants Kohler, Held, Borg-Warner and Decker that the evidence against them was insufficient to go to the jury (and to provide some indication of the strength of the government's case against all of the appellants), we will

begin our analysis with a review of some of the government's evidence.

THE GOVERNMENT'S CASE

We emphasize at the outset our conclusion that the evidence of an illegal price-fixing conspiracy is compelling. The proof of the conspiracy rests in large part upon the testimony of witnesses who were themselves defendants or executives of defendant corporations. These witnesses described various meetings they attended where price discussions occurred and price fixing-agreements were reached. When this multiple "eyewitness" testimony is considered in light of the largely admitted simultaneous price moves made by the indicted manufacturers, the strength of the government's case becomes apparent.

We will discuss in turn the four "phases" of the conspiracy alleged by the government. We note that the government was not required to prove that all the means and methods alleged in the indictment were utilized or that each defendant participated in each phase of the conspiracy or, indeed, that any of the illegal agreements were carried out. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). A conviction against any defendant is warranted if the jury finds beyond a reasonable doubt that the conspiracy alleged in the indictment existed and that the defendant knowingly became a member of the conspiracy, either at its inception or at a later phase of its operation. Moreover, no formal agreement is necessary to constitute an unlawful conspiracy; it is sufficient that a concert of action be contemplated and the defendants conform to the arrangement. "Where the circumstances are such as to warrant a jury in find-

ing that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." *American Tobacco Co. v. United States,* 328 U. S. 781, 810 (1946). See also *Esco Corp. v. United States,* 340 F.2d 1000 (9th Cir. 1965).

October-November 1962 Enameled Cast Iron Bathtub Price Increase

It is undisputed that, with the exception of Borg-Warner, all the indicted corporations published identical increased prices on special truckload and carload "discount prices" on certain high volume enameled cast iron bathtubs in October and November 1962. Although Borg-Warner did not issue a printed sheet, there was evidence that it "published" similar price increases on the bathtubs in question by a series of telephone calls made in October to sales representatives around the country, each of whom communicated the prices to wholesale distributors. We think the evidence would support a jury finding that these bathtub price increases were the direct result of an agreement reached at a meeting of the indicted corporations' sales officials held in appellant Quinn's room at the Sheraton-Chicago Hotel on September 17, 1962, the evening before a regularly scheduled PFMA meeting.

There was evidence that the following persons were present at this September 17 gathering in Quinn's room: appellant Quinn (American Standard), appellant Held (Kohler), defendant Kelch (Borg-Warner), defendant Casner (Crane), defendant Backner (Universal Rundle), Charles J. Callanan, Jr., a Rheem executive and its

representative to the PFMA, and J. V. Cannon, Director of Marketing of the Eljer Division of Wallace-Murray. There was substantial "eyewitness" testimony concerning price discussions and agreements at this gathering. For example, the government's first witness, Callanan (Rheem), testified that he attended this September 17 gathering in Quinn's room and that specific prices for bathtubs in question were discussed there. He further testified that when he left the meeting he knew what the price increases would be:

> "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?
>
> "The Court: If anything.
>
> "The Witness: The prices as reflected in my bulletin of November 2, 1962 [Rheem's published discount prices], were the prices that I came out of that room with that understanding."

These prices were the identical prices adopted by all the other indicted manufacturers. Moreover, although Callanan could not recall specific statements by each attendee concerning the bathtub price increase, he did testify that defendant Kelch (Borg-Warner) participated in price discussions and that appellant Held (Kohler) "was there listening" to them.

Cannon (Wallace-Murray) also testified that he was present at the meeting in Quinn's room and that prices for the bathtubs in question were discussed there. He further stated that when he returned to Pittsburgh he reported the price discussions to his superior, Loren H. Bonnett, Vice President and General Manager of Wallace-Murray's Eljer Division and told him he "felt confi-

dent there would be a price increase" on the bathtubs in question. Bonnett confirmed that Cannon reported the September 17 price discussions to him:

> "Q. To the best of your recollection, Mr. Bonnett, what did Mr. Cannon tell you concerning these increased prices?
>
> "A. To the effect that there was a general discussion, that higher prices were wanted and needed, by everyone, and that there was a tentative agreement to increase prices, tentative discussion. I couldn't say that there was a definite agreement by everyone, but prices were discussed."

In light of this evidence, and considerable other evidence in the record, we think the jury could have found that the October-November 1962 enameled cast iron bathtub price increases were the result of a price fixing conspiracy. As to all appellants[1] except Decker (American Standard),[2] there was certainly sufficient evidence to go to the jury.

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1. Kohler contends that there was insufficient evidence of Held's authority to impose criminal liability on Kohler. We will discuss our conclusion to the contrary along with our consideration of the other arguments raised in the separate brief of appellants Kohler and Held.

2. Decker argues that there was no evidence to justify a finding that he participated in any of the four phases of the conspiracy. The government, on the other hand, argues that there was sufficient evidence for the jury to conclude that Decker participated in all four phases. Since we are convinced of the sufficiency of the evidence (which will be discussed later) concerning Decker's participation in the fourth phase of the conspiracy, the price fixing concerning the changeover to all acid-resistant fixtures, and since that evidence alone is

The Agreement to Maintain and to Increase the Prices of Vitreous China Plumbing Fixtures

The second goal of the conspiracy, the government asserted, was to maintain and ultimately to increase prices on vitreous china plumbing fixtures. It is undisputed that on January 14, 1963 Crane announced an approximately 7 per cent increase in published wholesaler net prices for all vitreous china plumbing fixtures and at the same time withdrew certain special discount prices on some high volume items. On January 23, 1963 American Standard increased both its wholesaler net prices and its special discount prices on vitreous china plumbing fixtures by about 7 per cent. Within a month thereafter all[3] the other indicted manufacturers had substantially followed American Standard's new prices, and Crane retroactively reinstituted special discount prices at the same higher level adopted by the other manufacturers. We think there was ample evidence for the jury to find that these price increases were the result of an illegal agreement.

Callanan (Rheem) testified, for example, that at the September 17, 1962 gathering in Quinn's room at the Sheraton-Chicago hotel:[4]

". . . there was a discussion with regard to raising

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sufficient to support the jury verdict against Decker, we need not pass on the sufficiency of the evidence of his involvement in the first three phases.

3. Borg-Warner increased its trade sheet prices on vitreous china plumbing fixtures by 7 per cent on February 12, 1963.

4. As we have stated there was evidence that Quinn (American Standard), Held (Kohler), and Kelch (Borg-Warner) were among those present.

> the prices of china on the Special Buying Opportunity [special discount price sheets] but it was felt that unless the short-line manufacturers increased their price, we couldn't get too far away from it."

He also related that he concluded at the time that the special discount prices in effect then would be maintained by the group:

> "Q. What was decided with respect to the vitreous china staple prices on your Special Buying Opportunity of May 1962, which was the subject of discussion?
>
> "The Court: If anything.
>
> • • •
>
> "A. My opinion when I left the room was that there would be no change in staple prices in that Special Buying Opportunity [special discount price sheet]."

Callanan also testified that at the September 17 meeting "there was a feeling that there should be an across-the-board raise of some percentage to strengthen the china prices."

The evidence also indicates that top level representatives of the Enameled Cast Iron Industry Group of the PFMA met at the Shoreham Hotel in Washington, D.C. on November 20, 1962, the day after a special dinner meeting of the Enameled Cast Iron Industry Group in Washington. Robert J. Pierson, Vice President for Marketing of Rheem's Home Products Division, testified that at this November 20 meeting he participated in a discussion regarding some proposed price increases with Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner) and Casner (Crane). He said that Casner told the group his company had instructed him to

raise prices and that they were going to certain levels in spite of what the industry might do. Pierson further testified that, at this point:

> "There was a general discussion regarding each individual company's reaction to it. It was my opinion when I left that people probably would follow the lead of Crane in some form or another."

We have already pointed out that on January 14, 1963, Crane was the first defendant to announce an across-the-board 7 per cent increase for all china fixtures in its wholesaler net price book and that shortly thereafter all the other indicted corporations followed.

Charles Betz, who at the relevant time was Briggs' Sales Vice President, testified that in January 1963 he had a telephone conversation with Raymond A. Pape, a Crane official, concerning vitreous china prices and told him he "would certainly go along" with a sensible price increase "because these past price practices were very disastrous to our business." Moreover, Betz testified that, when Briggs subsequently increased its china prices, it was because of its competitors' actions and pursuant to his telephone conversation with Pape.

Government witnesses also established that, after the vitreous china increase had been effected by all defendants but Borg-Warner, there remained considerable doubt whether the new prices would remain in force. However, the evidence indicates that at a "special meeting" of the Enameled Cast Iron Industry Group of the PFMA at the Waldorf-Astoria in New York on February 7, 1963 several of the conspirators agreed to try to maintain the new prices. Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Calla-

nan (Rheem), Pape (Crane), Bonnett (Wallace-Murray), and Backner (Universal-Rundle) attended this special meeting. Bonnett testified that after the "formal" part of the meeting there was a "price discussion." He stated that he stayed for only a few minutes and then went to Quinn's room upstairs, and that Quinn told him he would come up later and report whatever transpired. Quinn arrived at 4:00 p.m. and they discussed the price decisions made at the meeting. With respect to the vitreous china price increase Bonnett testifed as follows:

> "Q. Did you discuss with Mr. Quinn—did you tell him what Murray Corporations' intentions were with respect to the recent vitreous china increase?
>
> • • •
>
> "A. We had published a new price and when we did, it was our intention to try to adhere to those prices to the best of our ability. So this would have been understood, that we would try to maintain any new prices that we had published.
>
> • • •
>
> "Q. Did Mr. Quinn indicate to you at this time, in his hotel room, what the view of the people downstairs was in connection with the recent vitreous china increase?
>
> • • •
>
> "A. Well, the general consensus was that the new prices would—we would try to maintain the new prices."

Five days after Kelch (Borg-Warner) attended this February 7 meeting Borg-Warner also announced a 7 per cent across-the-board increase on china fixtures.

Thus in the light of the above and other substantial evidence in the record, we think a jury finding that vitreous china prices were fixed as a result of illegal agreements would be plainly justified. The evidence on this point against all appellants, except perhaps Decker, was sufficient to go to the jury.

The Agreement to Limit Maximum Discounts From Wholesaler Net Prices

The third phase of the conspiracy, the government asserted, was an agreement to limit discounts on quotations on project or job work to a maximum of 15 per cent from wholesaler net prices on enameled cast iron fixtures and 20 per cent on china fixtures. We think there was sufficient evidence to justify a jury finding that the defendants illegally agreed to limit maximum discounts in violation of the Sherman Act.

Callanan testified that there was a discussion about job pricing and maximum discounts at the gathering in Quinn's room at the Sheraton-Chicago Hotel on September 1, 1962:[5]

"Q. What was the discussion that evening in Mr. Quinn's room concerning discounts from sheet prices, Mr. Callanan?

"A. I can't remember what the discussion was, but I came away with the opinion that discounts that I would be using would be 15 per cent on iron and 20 per cent on china.

"Q. What was your—

"The Court: That you alone would be doing that?

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5. See note 4, supra.

"A. I don't know what other people were doing.

• • •

"The Court: All right. Then, you would do it. You came away with the opinion that only you would be doing what you said you would be doing?

"A. Oh, no.

"The Court: That is what we want to know. If it is that, say that.

"A. I was of the opinion that other people would be using the same structure.

"Q. What other people, sir?

"A. The other members who were in the room that evening.

"Q. And what figures were they?

"A. Fifteen per cent on iron and twenty per cent on china."

Moreover, Bonnett (Wallace-Murray), who had been upstairs in Quinn's room during the price discussions at the February 7, 1963 meeting at the Waldorf-Astoria[6] testified that Quinn in his report to him about the price discussion:

". . . indicated there had been some discussions about discounts on plumbing fixtures and to try to keep some semblance of reason, and that there was a tentative discussion or agreement not to go below a certain point."

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6. Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Callanan (Rheem), Pape (Crane), Bonnett (Wallace-Murray), and Backner (Universal Rundle) attended the Waldorf-Astoria meeting.

Bonnett also stated that the specific discount limits discussed were 15 per cent on cast iron and 20 per cent on vitreous china. He further testified that he told Quinn "we would try to adhere to those discounts."

We think there was sufficient evidence in the record for the jury to find an illegal agreement to limit maximum discounts and that there was sufficient evidence against all appellants, except perhaps Decker, on this point.

The Agreement to Eliminate Regular Enameled Cast Iron Plumbing Fixtures and to Increase the Prices of Acid Resistant Fixtures

The fourth phase of the conspiracy alleged by the government was an agreement to discontinue the production of the lower priced line of regular enameled cast iron plumbing fixtures with the planned result of an increased price structure resulting from the changeover to all acid resistant enameled cast iron fixtures. Regular enameled fixtures, because of their lower price, constituted the defendants' largest selling line of enameled cast iron plumbing fixtures; regular enameled fixtures accounted for more than $20,000,000 in gross annual sales at American Standard alone. Nevertheless, beginning in early 1961 the industry began considering the possibility of making only the higher priced acid resistant fixtures "in response to the increasing competition from plastic fixtures and steel fixtures both of which were all acid-resisting." (Appellants' Joint Br. p. 24). On June 7, 1963 the Department of Commerce at the urging of the industry announced a revision of former Commercial Standard CS 77-56, effective July 10, 1963.

and for the first time made acid resistant cast iron enamel fixtures the industry standard.

On July 1, 1963 American Standard announced its intention to discontinue production of regular enamel cast iron plumbing fixtures and it published revised prices on its acid resistant fixtures which were higher than those for the old regular enamel fixtures. Within two months, all the indicted producers of cast iron plumbing fixtures announced the discontinuation of regular enameled fixtures and published similar new prices for acid resistant fixtures. We think there was ample evidence to justify a jury finding that the changeover to all acid resistant fixtures with its concomitant new price schedule was the result of an agreement in violation of section 1 of the Sherman Act.

For example, there was evidence that acid resistant prices were agreed upon at a gathering after a meeting of the PFMA Enameled Cast Iron Industry Group at the Biltmore Hotel, Palm Beach, Florida, on March 28, 1963. Pierson (Rheem) testified that after the official meeting he met with Quinn and Decker (American Standard), Kelch (Borg-Warner), Held (Kohler), Casner (Crane), Callanan (Rheem), Balmer and Cannon (Wallace-Murray), Backner (Universal Rundle) and possibly Pape (Crane) in Quinn's hotel room where they discussed the changeover and the new acid resistant prices. Pierson testified in part as follows:

> "A. The discussion resolved [sic] around the specific time-table that would occur in this change from —in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.

"Q. Were specific prices mentioned during the course of this meeting?

"A. Yes.

"Q. Were specific prices mentioned for the 14-inch and the 16-inch bathtubs?

"A. Yes.

"Q. Were there any prices or any formulae presented at this meeting concerning small ware? That is lavatories?

"A. There was a plan, yes, a price schedule put forth.

* * *

"Q. What was the formula put forth, sir?

"A. It was approximately as we have indicated the increase in our price schedule.

* * *

"Q. What was decided at this meeting, if anything, Mr. Pierson?

"A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.* (emphasis added)

Pierson specifically recalled that appellant Held (Kohler) said that he was speaking for his company and that they would go along with the plan. He also stated that the entire group remained at the meeting until the price discussions were concluded. Callanan confirmed that there was a price discussion at this gathering and that a specific pricing structure was put forth. Cannon also testified that the "proper philosophy" of pricing in the new all acid resistant market was discussed at this gathering and that certain prices were decided upon.

There was also evidence that new acid resistant prices were again discussed and the illegal agreement reaffirmed at a meeting at the Airport Hotel in Pittsburgh on May 15, 1962 attended by Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Cramer and Pape (Crane), Bennett and Cannon (Wallace-Murray), Buckner (Universal Rundle), and Callanan (Rheem). Bennett was asked at trial what was decided at the Airport Hotel meeting with respect to certain colored bathtub prices and responded:

> "It's difficult to say whether a definite decision was reached on these prices, they were discussed by most of the people there but we certainly did not poll the group to say, 'Would you do this, will you do that?' It was my understanding when I left the meeting that the prices would generally be on this level."

Pierson did not attend this meeting but testified that when his subordinate Callanan returned from the meeting he reported to him that it "was his opinion that the plan to phase out regular enamel and the price schedule proposed was going to go through."

Moreover, there was evidence that the illegal agreement was again discussed and reaffirmed at a meeting in Quinn's room at the Waldorf-Astoria Hotel in New York on June 26, 1962 attended by appellants Decker, Quinn and Held, as well as Kelch, Cramer, Pape, Palmer, Bennett, Cannon, Pierson, Callanan and Buckner. Pierson testified that at this meeting there was "a general review of the proposed plan on this [all acid resistant] product line and the pricing that was related thereto." Cannon testified that Quinn or Decker showed him a copy of the announcement American Standard was going

to make concerning the changeover to all acid resistant fixtures and the new acid resistant prices; he further stated that this document was discussed by the group.

We think the overwhelming evidence on this phase of the conspiracy clearly warranted a jury finding that the changeover to all acid resistant fixtures and its concomitant price rise was the result of an illegal price-fixing conspiracy. Certainly there was sufficient evidence to support a jury finding against all appellants on this issue, including the appellant Decker. We think the evidence concerning events which transpired at three conspiratorial meetings he attended was certainly sufficient to support the jury verdict against him.[7]

Joint Arguments

Partisan Participation by the Trial Judge

Appellants contend that they were denied a fair trial because of the district judge's excessive participation in the trial, although they disclaim any intent to charge personal hostility on his part. They "explain" his

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7. As the Supreme Court pointed out in *United States v. Wise*, 370 U.S. 405, 416 (1962), "a corporate officer is subject to prosecution under §1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime. . . ."

In addition to the above evidence against Decker, we note the following facts: Decker was President of American Standard's Plumbing and Heating Division; Quinn was Vice President and testified that he had a close working relationship with Decker; and the evidence of the participation of American Standard and Quinn in all phases of the conspiracy was strong. In light of all this, we find no merit in Decker's claim that the case against him was too weak to go to the jury.

conduct by stating their belief that from the outset the judge was convinced of the appellants' guilt and thus viewed their conduct and that of their attorneys as designed either to be obstructive or to invite error.

The appellants have culled from the over 10,000 page trial transcript some three hundred incidents which they say illustrate the objectionable nature of the judge's conduct. They have broken these examples down into the following categories:

1. The trial judge's suppression of appellants' evidence;
2. The trial judge's cross-examination of witnesses and other prosecutor-like intrusions;
3. The trial judge's abusive and belittling treatment of defense witnesses and counsel;
4. The trial judge's openly suspicious attitude toward defense counsel and witnesses;
5. The trial judge's contrasting treatment of the government.

We are completely satisfied that no one of the incidents relied upon by appellants deprived them of a fair trial. But appellants contend that the incidents were so pervasive and frequent that they cumulatively had that result. In order to evaluate this most serious charge an examination was made of each page of the trial transcript.

A reading of the many unrelated incidents selected from a jury trial lasting sixteen weeks gives a distorted impression of the judge's conduct. Many of the incidents relied on by appellants are nothing more than the typical rulings and comments found in any trial transcript.

Others arise from the judge's understandable desire to keep the trial moving. Certainly the trial judge was testy on occasion and certainly the reasons given for some of his rulings left something to be desired. But all of this must be kept in perspective. This was a long trial and in great measure involved an exceedingly technical subject. Much of appellants' grievance is really directed at the correctness of the judge's evidentiary rulings which are matters for independent consideration. But in fairness to the judge it must be said that many of the objections of appellants' counsel were so lacking in substance or so repetitive that they deserved to be consistently overruled. Because of the number of these rulings, however, they could have created the false impression with appellants that judicial objectivity was lacking.

Our evaluation of the record leads us to conclude that the trial judge did not unduly deprecate appellants' evidence, that in their setting his questions to witnesses did not exceed proper bounds either in tiber or extent, that there was nothing approaching abuse either to defense witnesses or their counsel, that the trial judge did not portray an openly suspicious attitude toward defense counsel and witnesses, and finally, that there was none of the so-called contrasting treatment of the government which appellants claim demonstrates the trial judge's unfairness to them.

Prosecutor Misconduct

Appellants advance numerous reasons why they were substantially prejudiced and denied a fair trial as a result of the improper and inflammatory conduct of the government attorneys. We shall consider them seriatum.

Appellants first assert that the prosecutor indulged in misleading and inflammatory cross-examination of appellant Norman Held (Kohler) concerning alleged unfair labor practices by Kohler prior to the indictment period. In his opening to the jury Kohler's counsel said:

> "Now, the plant up in Kohler, Kohler Village, employs about four or five thousand people. It is the principal employer in the whole county. One way or the other the economy of the county depends upon full employment at Kohler. Kohler accepts that responsibility and has a philosophy to try to discharge it. It is a remarkable thing. There is a period in the 1930's and thereafter, you people, some of you people remember the 1930's and thereafter, a period of 17 years when not an employee of the Kohler Company lost a day's pay through layoff. In this decade the same thing has been true."

Over government objection Held was permitted to testify as follows:

> "Q. And how large a town is Kohler and would you just describe it, please, the village of Kohler?
>
> "A. That is just a small town of several thousand and it is just a little bit different from the usual factory type of town. It is a planned community and it is probably due to the fact that the Kohler family and the Kohler Company didn't want what might be termed a factory town and brought in town planners, architects and engineers with the result that it is rather a pretty little place with its own school system and its own governing body, the people that live there and with a high incidence of owner-owned homes.

"Q. People mostly own their own homes there, is that correct?

"A. Yes, sir.

"Q. Mr. Held, could you give us a brief history of the Kohler Company, when it started to make plumbing fixtures, when it was started, and so forth?

"A. Yes, I think I can do that. The company had its start in 1873 when one Michael Kohler, an immigrant from Austria, started a manufacturing plant mostly castings in Sheboygan, Wisconsin. And at that time he produced farm tools, farm equipment, some things like iron drinking fountains and iron horse troughs and items similar to that, some ornamental things, too, that could be cast at the time. He did some castings in bronze or brass and steel tubes. However, about ten years later, 1883 or so, he began to get into enameled utensils and graduating into the enameled plumbing fixture business and then a new plant was needed, so around about 1909 or so, a new plant was constructed about three miles west of Sheboygan, Wisconsin, and this is the present site of the plant now and by that time, the primary product was plumbing fixtures, and at this time enameled cast iron plumbing fixtures. And about 1905, the son of John Michael Kohler, who passed away, Mr. Walter J. Kohler took over as president and from that time forth, the business grew and became emphatically a manufacturer of plumbing fixtures and began to grow and market its product more widely."

On cross-examination the prosecutor asked Heid the following question:

> "Q. Mr. Heid, didn't you purposely leave out of your history of the Kohler Company the fact that between 1934 and 1960, Kohler had one of the longest and bitterest strikes in American history at the end of which Kohler Company was found by the National Labor Relations Board to have engaged in an illegal refusal to bargain in good faith and in other unfair labor practices?"

An objection was made by the attorney for American Standard. Nothing was said by Heid's attorney. However, the attorney for Kohler addressed the court as follows: "If the Court please, I urge the Court not to sustain the objection. I would wish the witness to be allowed to answer." Whereupon the witness purported to explain in a rather oblique fashion his lack of reference to the strike. The prosecutor then asked additional questions which went into some detail concerning unfair labor practices found by the National Labor Relations Board,[8] eventually referring to Kohler's purchase of guns, ammunition and tear gas, eviction of strikers, investigating the private lives of union officials, and other inflammatory topics.

The emotional nature of some of the cross-examination on this subject matter may have tended to temporarily divert the jury from passing on the merits of the criminal charges, at least as to Kohler and Heid.

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8. Appellants contend that the questions did not fairly state the findings of the National Labor Relations Board. We think the deviations are not of independent significance here.

However, Kohler and Held invited some such inquiry by first attempting to create a picture of a completely beneficent employer. Moreover, the initial statement by Kohler's counsel, when a threshold objection was made to such cross-examination, "opened the door further." However, when Kohler's counsel later objected on the ground that the questioning had become inflammatory —by reference to Kohler's purchase of guns and tear gas, etc.—we think the judge should have terminated the line of questioning. We think its potential for prejudice outweighed its evidentiary value. We say this despite our realization that the witness never did permit a possibly less inflammatory development of the government's position because of a claimed lack of personal knowledge of events during the strike period although some of his favorable direct testimony concerning Kohler suffered from the same infirmity.

In the circumstances of this case, however, we are unable to find that the nature of the interrogation constituted reversible error even as to Kohler and Held. It was an incident involving two appellants. The time spent on it before the jury was minimal, perhaps one hour in a total of sixteen weeks. The trial proceeded for several weeks after the incident. At Kohler's request, the matter was not alluded to either in the summations or the charge. Considering these factors in their setting and in conjunction with the strength of the government's evidence on the criminal charge, we cannot find that this incident could have so affected the jury that a fair trial was denied appellants.

The appellants also accuse the prosecutor of using his opening statement to lead the jurors to believe they

were victims of the alleged conspiracy.[9] The trial judge denied appellants' motion for a mistrial. We fully recognize that a prosecutor is required to maintain a high standard of conduct in the performance of his duties. In a proper case his conduct may require a mistrial. See United States v. Schartner, 426 F.2d 670 (3d Cir. 1970). But we think the prosecutor here was saying nothing which was not rather self-evident in view of the nature of the charge and the products involved.

Appellants further contend that the prosecutor appealed to jury bias by stating in his opening and closing remarks that the grand jury which returned the indictment was composed of local residents. Passing over the appellants' failure to object on this score, we think it lacks sufficient substance to warrant reversal either alone or in conjunction with other claimed errors. Indeed, defense counsel were not above hinting to the jury that appellants were represented by Pittsburgh counsel as opposed to the government's Washington representation.

Appellants next assert that the government intentionally adduced incriminating and/or impeaching evidence through improper and prejudicial examination of witnesses. Their first grievance under this heading relates to the government's use for refreshment pur-

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9. "Now, when the plumbing contractor gets it, he doesn't keep it. He sells it. To whom does he sell it? He sells it to you. He puts another price on top of it. So, if you have the manufacturers, as in the case here, agreeing to increase prices that they sell plumbing fixtures to their wholesalers, sooner or later you are going to be paying that increase, the public. Particularly, on these plumbing fixtures which were the heart and soul of this conspiracy."

poses during cross-examination of appellants Quinn and Decker of certain tape recordings of alleged telephone conversations with defendants and third parties made by William Kraemer.[10] It must be emphasized that the jury never was given an identification of the voices on the tape or told what was said. The issue reduces itself to whether the district court committed error by permitting the use of tapes and earphones in an attempt to refresh the witnesses' recollection rather than requiring the use of the transcript of the tapes. We think an exercise of discretion was involved and we cannot find an abuse of discretion under the circumstances of this case. United States v. McGlover, 371 F.2d 665 (3d Cir. 1966); see 3 Wigmore, Evidence 1785 (3d ed. 1940).

Appellants also charge the prosecuting attorneys with violation of their professional obligations of candor and fairness. We have examined the bases for this charge and find them to be without merit. It is obvious that in a case of this magnitude the prosecutor would slip on occasion or suffer from a faulty recollection of the evidence. Indeed, conflicting evaluation by counsel of the probative significance of evidentiary matter is often a significant aspect of a trial, even more so when it is a jury trial. We think the appellants' charges against the prosecution are lacking in substance.

Appellants' last objection is to some statements made in the prosecutor's closing although they did not move for a mistrial. Certainly the prosecutor did overstep the bounds of propriety in a few instances in the course of his five hour closing, particularly in appearing

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10. Kraemer was Executive Secretary of the PPSEA.

to personally vouch for the integrity of a government witness and in implying the existence of damaging evidence outside the record. But in our view the trial court, by the explicit instructions it gave the jury at both the government's and appellants' request, fairly corrected the matter. We do not view the prosecutorial aberrations as being so prejudicial to defendants that they were deprived of a fair trial. See *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 237 (1940).

Evidentiary Rulings

Appellants argue they were prejudiced by certain rulings on government evidence. They first challenge the propriety of the admission of Government Exhibits 551 through 556 (HCA notes). As we have noted, the elimination of regular enamel products and the fixing of acid resistant enamel prices was the fourth alleged event in the criminal conspiracy charged by the government. A part of the government's evidence on this aspect of the conspiracy concerned events at an informal session after the PFMA meeting at the Palm Beach Biltmore on March 28, 1963. As evidence of the agreement to eliminate regular enamel and to fix acid resistant fixture prices, the government offered two documents. One was an American Standard worksheet entitled "Acid-Resisting Enamel Prices" dated March 1, 1963. The other consisted of six pages of undated and unsigned handwritten notes on the stationery of the Hotel Corporation of America (HCA notes), which echoed figures and statements on the American Standard price worksheet. The appellants claim the admission of the HCA notes was reversible error.

They first argue that the notes were inadequately identified in that there was insufficient evidence concerning their author for them to be admitted in evidence. The government's contention is that Raymond Pape, a Crane official, wrote the notes at the Palm Beach meeting. In support of their position, government counsel introduced a stipulation by all counsel that the HCA notes were found in Crane's files and were stapled together. The government also called a former secretary in Pape's department to make a lay handwriting identification of the notes.[11] She testified that she had done work for Pape and had been familiar with his handwriting "at times." She identified the handwriting on four of the six pages as resembling Pape's. She could not identify the writing on the two remaining pages.[12]

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11. The government represents in its brief that although Pape himself was technically available to be called as a witness, he was not called to identify the HCA notes because of the precarious state of his health. Indeed, Pape filed a motion to quash the government's subpoena to him on this ground. Although his motion was denied, the trial judge indicated his intention to take all possible measures short of granting Pape's motion to protect him. Moreover, the government represented to the trial judge that it would avoid calling Pape if at all possible. Pape died of heart failure shortly after the trial ended.

12. The witness testified as follows concerning each of the six pages:

(1) GX-551: "As I remember, it looks as if it could be Mr. Pape's but I can't be sure right now."

(2) GX-552: "[I]t resembles Mr. Pape's."

(3) GX-553: "It looks like it could be Mr. Pape's."

(4) GX-554: "There really isn't too much hand-

Appellants contend that since a substantial danger of a wrongful attribution of guilt existed if these documents were erroneously identified, no less than a "positive, unequivocal identification of the handwriting must be required." In fact the weight of authority requires only that a *prima facie* case of the alleged author's identity be established for the documents to be admitted. See generally 3 WIGMORE, *Evidence*, §§93 *et seq.* (1940); MCCORMICK, *Evidence* §189 (1954). The ultimate issue of their authorship and the probative weight to be afforded them is for the jury. We conclude upon a reading of the record that the requisite prima facie case as to the four pages identified by the secretary was established. Thus, we hold that the trial judge did not abuse his discretion in admitting them.

Two of the pages were admitted without any handwriting identification. The jury was instructed that these pages might be compared with the other four pages for handwriting similarities should the other four be determined to be Pape's. Appellants challenge the propriety of allowing the jury to make such a comparison. They assert that the standard for comparison — the four pages — must be "admitted or proved" to be genuine before they may be used for comparison purposes. They further assert that the evidence was insufficient for the trial judge to properly determine the genuineness of the handwriting on the four pages so that they could be used as a standard of comparison.

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writing on here to say too much about it. . . . . I can't really say."

(5) GX-555: "That appears to be Mr. Pape's."

(6) GX-556: "I can't be sure about this one."

Where documents are admitted for purposes other than handwriting comparison, they may be used by the jury as a standard for handwriting comparison if the handwriting is admitted or proved to be that of the alleged author. *Williams v. Conger*, 125 U. S. 397, 411-15 (1888); cf. 28 U.S.C. §1731. The vast weight of authority requires that the trial judge determine whether the genuineness of the handwriting on the documents to be used as the standard is sufficiently proved. E.G., *United States v. Swan*, 396 F.2d 883 (2d Cir. 1968); *Citizens' Bank & Trust Co. of Middlesboro, Ky. v. Allen*, 43 F.2d 549 (4th Cir. 1930); 7 WIGMORE, *Evidence* §2020 (1940). In those jurisdictions where the trial judge is required to make the initial determination of genuineness the courts have adopted differing standards of proof. We believe the proper standard requires that there be sufficient evidence so that a jury finding of genuineness would not be subject to reversal as against the weight of the evidence. See *United States v. Swan*, supra.

In view of the present state of the law as developed above, we are convinced that the trial judge, had he considered this question directly, could only have properly held that the four pages were appropriate for jury use as a handwriting standard.[13] We say this because

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13. In view of our disposition of this issue, we need not decide at this time whether the requirement of an initial determination of genuineness by the trial judge ought to be eliminated and the question of genuineness both as to the standard and the other documents be left solely to the jury. Such a course has been suggested by some commentators. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Article IX, Rule 9-01 (March 1969).

the evidence supplied by the lay handwriting witness, a former Crane employee, in conjunction with the fact that the HCA notes were subpoenaed from Crane's PFMA file, were stapled together, and were internally consistent in content convince us that a jury finding that the four pages were in Pape's hand would be fairly supported by the evidence. Thus, we conclude the four pages were properly before the jury for use as a handwriting standard.

The appellants challenge the judge's instruction on the HCA notes in this connection as well. They contend that the instruction assumed that the four pages to be used as a handwriting standard were in Pape's hand when in fact that very issue was in dispute. We have read the instruction and do not find that it contains such an assumption.

The appellants' final argument concerning the admissibility of the HCA notes is that they were irrelevant and immaterial because the time, place, and circumstances of their making were not brought out. The notes reflected proposed prices for products which the American Standard worksheet contained. Some of the prices on the worksheet were crossed out or circled and changes were penciled in. The HCA notes were similarly marked to show these changes. Moreover, general policy statements written in pencil on the worksheet were also recorded in the HCA notes. Most convincing of all, however, is the fact that the American Standard proposed prices, which were reflected in the HCA notes found in Crane Company's files, were in some instances only tentative prices which were changed before their public announcement. The inescapable conclusion is that Crane Company had pre-knowledge of American Standard's

proposed prices. Even without knowing the source of this information, that evidence would be relevant and material to the question whether a price-fixing conspiracy existed.

Appellants next assert that the court erred in permitting the government to lead witnesses in critical areas. They concede that the trial judge has a broad discretion but they assert in effect an abuse of discretion. Considering that the government's non-expert witnesses were defense oriented we cannot find from an examination of the record that the trial court abused its discretion. Indeed, we think the record is replete with answers by such witnesses establishing a foundation for the use of leading questions. Nor can we find, as appellants contend, that the "cross-examination" device was so employed by the government on its witnesses as to have an adverse effect on the reliability of their testimony. We also find without merit appellants' contention that by permitting government witnesses to testify in terms of impressions or conclusions in so-called critical areas, the trial judge substantially impaired their right of cross-examination.

Appellants also contend in a somewhat oblique fashion that the co-conspirator hearsay exception deprives them of their Sixth Amendment right of confrontation. We note, however, that a decision of this court holds that the Confrontation Clause ruling in *Bruton v. United States*, 391 U. S. 123 (1968), did not invalidate the hearsay exception rule in conspiracy cases. *Parness v. United States*, 415 F.2d 346 (1969). This view has been adopted in other circuits. *United States v. Lawler*, 413 F.2d 622 (7th Cir. 1969); *Campbell v. United States*, 415 F.2d 356 (6th Cir. 1969). Moreover the United States Supreme

MICK, *Evidence* §225, at 460 (1954). The HCA notes, for example, clearly were not offered for the truth of their contents and did not rest for their value upon the credibility of Pape or anyone else. See McCORMICK, *supra*, at 463-66.

The instances of true hearsay declarations by persons who did not take the stand amounted at best to a handful.[18] In any case, none of the statements attributed to nontestifying declarants was strongly incriminating. The sum of its weight was extremely small and insignificant when the record is considered as a whole. In light of the compelling strength of the government's case, we can say beyond a reasonable doubt, that the admission of hearsay statements of nontestifying declarants did not affect the outcome of the case. *Chapman v. California*, *supra*.

Appellants also assert that, assuming the validity of the co-conspirator exception, the trial judge committed error in not requiring the government first to prove *prima facie* by the acts and declarations of each appellant the existence of the conspiracy and the participation therein by each appellant before admitting the acts and declarations of each conspirator against all appellants. This court is well aware of the danger of finding guilt by mere association which is inherent in a conspiracy trial involving numerous defendants. See the concurring opinion of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949). However, we

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spoken, and not whether they are true." *State v. Wentworth*, 37 N.H. 217 (1858), quoted in 6 WIGMORE, *Evidence* § 1766, at 179 (1940).

18. E.g., N.T. 1929-29 (J.A. 190-91a), 2016-20 (J.A. 296-300), 2183 (J.A. 300).

note that the trial judge was faced with a difficult order-of-proof problem because of the multi-step nature of the alleged conspiracy and because the government was not able at the very outset to show the requisite involvement of every defendant. The control of the order of proof was a matter within the discretion of the court. See *Enco Corp. v. United States*, 340 F.2d 1000, 1009 (9th Cir. 1965). We find no abuse of discretion in the trial judge's rulings on the admissibility of the hearsay evidence in this conspiracy case.

The appellants assert, however, that at the time the hearsay evidence was received the trial court erroneously refused to give cautionary instructions to the jury with respect to the limitations on the use of hearsay evidence. Assuming that such an instruction would have been desirable, we fail to find where the appellants requested such limitations at the pages of the transcript cited in their brief. In any event, by the time the first two government witnesses had finished testifying, a *prima facie* case of conspiracy had been made out involving all the defendants with the possible exception of appellant Decker who was later tied in.[19]

Appellants next contend that the government's evidence fatally varied from the one-count charge in the indictment. Appellants' position appears to be that the proof tended at best to show two or more separate conspiracies and thus a variance existed because only one conspiracy was charged. We think the short answer is that the evidence was consistent only with the exis-

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19. We think the above discussion is also a complete answer to appellants' argument that they were denied the right to an individual determination of their guilt or innocence.

Court held in 1924 that the conspiracy exception did not deny a defendant his right of confrontation. *Delaney v. United States*, 263 U.S. 586.

Appellants have called our attention to *California v. Green*, .. U.S. ..., decided June 22, 1970, which they say supports their contention that use of the co-conspirator exception to the hearsay rule violates the Confrontation Clause. In *Green* the court held in a non-conspiracy criminal case that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Although the Court stated that it had no occasion in *Green* "to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements," its opinion suggests the use in criminal cases of such exceptions to the hearsay rule will be subject to careful scrutiny by the Court.[14]

We do not find that *Green* alters our conclusion that we are bound by holdings that use of the co-conspirator exception does not violate the Confrontation Clause. Nevertheless, we have examined the record for hearsay declarations of nontestifying declarants. We have concluded that, even if the co-conspirator exception be deemed a violation of the Confrontation Clause where

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14. Mr. Justice Harlan, concurring in *Green*, stated his conclusion that "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* all *available* witnesses whose declarations it seeks to use in a criminal trial." A Confrontation Clause challenge to the co-conspirator exception has been made in *Evans v. Dutton*, 400 F.2d 826 (5th Cir. 1968), prob. jur. noted 393 U.S. 1076 (1969).

the declarant does not testify, the rule's application in the present case was harmless error under *Chapman v. California*, 386 U.S. 18 (1967).

Appellants' specific claims of prejudice are sketchy and conclusory.[15] Basically, they complain that incriminating statements of Casner and Pape were introduced although neither appeared on the stand. Pape's "testimony," they say, "came in through hearsay testimony of Cannon and Schambach and through the HCA notes." Casner's "testimony," they say, came in through the hearsay statements of Pierson and Callanan.

We have specifically reviewed the testimony of Callanan, Cannon, Pierson and Schambach (Pape's subordinate at Crane), as well as the HCA notes, for statements attributed to Casner and Pape. We have also reviewed the testimony of the other government witnesses for statements attributed to nontestifying declarants. We have found surprisingly few such statements. Some of these statements are probably not hearsay at all;[16] that is, they are not "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[17] McCor-

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15. They have made little attempt to document their claim by specific page references to the record.

16. E.g., N.T. 978 (J.A. 361a), 989 (J.A. 365a), 1008 (J.A. 368a), 2397 (J.A. 204a), 2469 (J.A. 214a), GX 518.

17. "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were

tence of one overall conspiracy as described in the indictment. We say this because the separate means and methods were connected to each other not only by a common plan to affect prices in the plumbing fixture industry, but also by a substantial identity of each of the defendants and co-conspirators in agreeing to and carrying out the challenged price moves. Moreover, the evidence also showed that more than one phase of the conspiracy was frequently discussed at each of the conspiratorial meetings, especially at the initial September 17, 1962 meeting in Quinn's room at the Sheraton-Chicago Hotel. The fact that each defendant's proved participation may not have been identical to that of the others does not itself multiply the number of conspiracies.

Appellants also contend they were denied a fair trial because the trial judge erroneously excluded or limited their evidence. In furtherance of this contention, the appellants cite four specific evidentiary rulings by the trial judge which were allegedly erroneous.

1. *The Beckman Charts.* Through its expert economic witness Dr. Donald Beckman, Kohler offered 107 charts graphically representing Kohler economic data for the years 1960 through 1967. The trial court restricted Kohler's graphic economic evidence to the four year period covered by the indictment[20] on the theory

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20. In the interest of precision we note that the court ruled that the charts would conform to its temporal limitation if they included all of 1962 although the indictment charged the conspiracy started sometime in September of that year. In the interest of convenience we shall refer to the time period contemplated by the court's ruling as the "indictment period."

that any economic evidence before or after the indictment period was irrelevant. We understand the trial judge's desire to avoid remote evidence in view of the magnitude of the trial and the potential for confusing the jury. However, we have no doubt that in this case evidence of the preceding two years and of the year following the end of the alleged conspiracy would not have suffered from that defect.

Appellants contend that they were substantially prejudiced by the trial court's temporal limitation because Dr. Beckman was unable to utilize all 107 of his charts. In fact, however, the trial judge indicated he would admit the charts if they were modified to reflect data limited to the indictment period and did admit those charts so modified. Thus, it is clear the trial court's ruling did not preclude the use of any charts and did not substantially harm the appellants' defense for that reason.

The appellants' contend, however, that the charts as amended to reflect only the indictment period were much less convincing in support of Dr. Beckman's testimony than they would have been if admitted as originally constructed. Thus, they claim that the restriction on these charts substantially diluted the effect of Dr. Beckman's testimony. We cannot agree. Dr. Beckman testified at some length with the aid of those of his charts which were admitted. His testimony was forceful and direct and in view of his distinguished credentials as an economic expert could hardly have been easily dismissed by the trier of fact. His thesis in simple terms was that, based on the relevant economic indicia of competitiveness, Kohler's pricing activities could only be the result of competitive forces in the marketplace.

The strength of Dr. Beckman's testimony is exemplified by the following quotation which is but one of several such statements he made during his testimony.

> "So the conclusion that seemed to me inevitable was that no prudent businessman would do such a thing unless he was forced to do it by economic forces, and if there had been an agreement, it certainly would not have been for the purpose of selling below costs and lowering the income of the company. So it [Kohler's pricing practice during the indictment period] had to be, in my judgment, *a result of highly effective competition; in fact of vigorous competition.*" (N.T. 8951) (emphasis added)

In addition, those charts which were admitted strongly support Dr. Beckman's analysis of the indictment period. Moreover, his testimony dealt with economic data not shown on his modified charts so that the substance of the material excised by the trial court's ruling was supplied by his oral testimony. For these reasons we conclude that the temporal limitation imposed on Kohler's charts, while error, did not substantially harm either Kohler or the other appellants.

2. *American Standard Field Reports.* Appellants also assign as error the district court's refusal to admit American Standard's exhibits 60 to 104. These exhibits were characterized by an American Standard witness as memoranda and documents made up by American Standard's Pricing Service in the regular course of its functions in recording information from field offices with respect to competitive activity and prices offered by competitors. They were offered as business records, pur-

suant to 28 U. S. C. §1732, to prove that American Standard and its competitors were not limiting discounts to customers as the indictment charged they had agreed to do. The district court refused to admit these exhibits for the truth of their contents as business records.

These exhibits were in the main based on information supplied by sources whose trustworthiness could not be ascertained from the documents themselves and was not established by oral testimony. Moreover, because the exhibits concerned transactions to which American Standard often was not a party, the normal presumption that a party keeps accurate records of its transactions is not available here. Because the regularity with which these records were kept does not tend to establish their accuracy, we believe the reasoning of the Ninth Circuit is particularly applicable here. In a landmark case in this area, the Ninth Circuit held that exhibits substantially similar to those offered here were not admissible as business records *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 212-17 (9th Cir. 1957) *cert. denied* 356 U. S. 975 (1958). Since we believe trustworthiness of the documents is the touchstone, we are not inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co. v. United States*, 281 F.2d 137, 148 (6th Cir. 1960). See *Palmer v. Hoffman*, 318 U. S. 109, 113-14 (1943). Thus we conclude the rejection of these exhibits as business records was proper.

Following the court's ruling, these exhibits were reoffered "as typical of the program or policy followed or the procedure followed by [American Standard] district managers throughout the United States." (T. 6051).

The court again refused the exhibits. The basis for this ruling was that the exhibits were cumulative in that a similar exhibit had already been introduced to illustrate the testimony concerning American Standard's method of gathering this information. We agree the exhibits were properly excluded on this ground.

3. *Kohler Exhibit 132.* Appellants contend the trial court erroneously excluded this exhibit entitled "Some Examples of Competitive Quotations—1963" which was offered to prove that Kohler and its competitors had not maintained maximum discount levels. The exhibit is a listing of over 600 specific job quotations during 1963 where Kohler quoted discounts which exceeded levels the government claimed the appellants had agreed to maintain. On voir dire it was established that some 2,000-2,500 quotations were made in 1963 and that these 600 odd examples listed in the exhibit were substantially all the quotations above the allegedly agreed upon maximum percentages. Yet the exhibit, by its title and contents, in no way revealed these facts. Thus, we agree with the government that the exhibit was to some extent misleading. On the other hand, the mere existence of a significant number of quotations exceeding the alleged maximum levels was relevant to the appellants' defense. While we might have ruled differently, however, we are not convinced the trial judge's exclusion of this exhibit in the form offered amounted to an abuse of discretion. Moreover, in view of the extensive defense testimony concerning the existence of these discounts, we believe the jury was to a large extent made aware of the appellants' proof on this point even without the exhibit.

4. *The Commerce Department Letter.* Kohler offered a multi-part exhibit containing a letter from an

official of the Commerce Department to prove that the appellants had not misled that Department concerning the general acceptance of regular enamel products in the industry. The government claim was that the appellants had deceived the Commerce Department on this matter in furtherance of their alleged agreement to change the Commercial Standard. The letter was dated October 18, 1962 and arguably demonstrated that the Commerce Department at that date believed that regular enamel products were standard in the industry, which in appellants' view would tend to weaken the government's case on this issue.

The letter was objected to on the ground that it referred to other correspondence which was not part of the submission, and thus, in the government's view, was objectionable hearsay. The trial court rejected the exhibit on the independent ground that its admission would violate the best evidence rule. The court ruled that the author of the letter "is the best evidence here, not his letter." Understandably the government does not argue on appeal that either the hearsay or the best evidence theory justified exclusion of this letter. We are convinced from our reading of the record that the letter ought to have been admitted although its probative value was minimal. The hearsay objection is groundless and in our understanding the best evidence rule does not require the author of the document be produced if the original document is offered.

However, even though we conclude the court erroneously excluded this exhibit, we are not convinced that the prejudice suffered by the appellants was substantial.

Jury Charge and Submission of the Case to the Jury

Appellants claim that they were substantially prejudiced by the trial court's conduct in connection with the preparation of his charge to the jury. Their first claim is that the court committed reversible error because it flatly refused to rule on each of their joint requests for points for charge. In fact the trial court did flatly refuse to rule on the original sixty-seven requests submitted by the appellants on the grounds they were too voluminous and general to be of any aid to him in preparing his charge. The government's requests were treated similarly. The appellants claim this refusal to rule on each of their requests so impeded counsels' preparations for argument to the jury that the appelants were denied effective assistance of counsel.

We note that the trial judge has broad discretion in ruling on points for charge. In this case appellants' points were prolix, imprecise, and often intertwined evidentiary assumptions with law in a highly partisan manner. Moreover, shortly after these requests were submitted the court informed counsel that he would give them a reasonable time to resubmit their requests in an acceptable form. Indeed supplemental requests were submitted and the trial judge ruled on them in substance. On this record, we conclude the trial judge did not abuse his discretion by refusing to rule on each of the appellants' initial requests. See 8 MOORE'S FEDERAL PRACTICE, Paragraphs 30.03 [1] and [2] (1969).

The appellants further contend that the trial court failed to accurately inform them of the contents of his charge and that they were substantially prejudiced in

their arguments to the jury for this reason. We note that the judge did advise counsel at some length of the substance of the points on which he would charge. However, appellants still claim that they were harmed in this connection and point to three specific instances of the substantial prejudice they suffered because they remained uncertain as to the substance of his charge on some crucial points. First they claim that they argued to the jury that an acquittal was required if the jury found that several conspiracies existed rather than one continuing conspiracy as was charged in the indictment. They claim they were prejudiced because the government argued a different version of the law and the judge failed to charge on their separate conspiracies theory. As we indicated previously, this record could support a finding of no more than a single continuing conspiracy. Moreover, the trial court told the appellants that he would not charge on a multiple conspiracy theory. Thus, if the appellants actually believed they would get such a charge or were entitled to one, they were self-misled, not judicially. There was no error here.

Appellants' second contention in this regard is that the court's pre-charge uncertainty concerning whether it would charge that an agreement to eliminate a product was a per se violation of the Sherman Act caused them not to argue this point to the jury for fear of subsequent contradiction by the trial judge. In fact the trial judge indicated that while he had some reservations, he was inclined to charge along the lines requested by the appellants. Appellants never advised the judge that they required a definite ruling from him on this point in order to aid them in the preparation of their closing arguments

to the jury. Indeed, counsel for Kohler did argue to the jury on this point as follows:

> "[T]here is no dispute that there was a change made in the Commercial Standard . . . eliminating from the standard any reference to non-acid-resisting enamel ware, and that all . . . or substantially all of them announced to the public their intention to discontinue the manufacture of regular enamel plumbing fixtures."
>
> "Now, there is no question that those events occurred. Although the government spent a good part of its case proving those facts, they are not in dispute and *they are not illegal; not a single one of them is illegal in itself. In and of itself, it was perfectly lawful. . . .*" (N.T. 9659-60) (emphasis added)

In these circumstances, we do not find that the trial judge committed error. Appellants also claim that the court failed to charge on this point and thus the jury could have convicted because they believed such an agreement, to eliminate a product, standing alone, was proof of guilt. A reference to the court's charge belies the claim that this matter was not satisfactorily covered in the charge.

The appellants' final contention is that they were harmed because the judge gave a "missing witness" charge although neither the government nor the appellants requested it. In view of the many allusions to "missing witnesses" by counsel for both sides in their closing arguments, we do not believe the judge abused his discretion by so charging.

In connection with the jury charge itself, the appellants claim five errors. First, they contend the trial

judge failed to charge the jury with respect to the responsibility of an "acceptor" of the Commercial Standard. They claim they were substantially prejudiced because the jury was not made aware that the elimination of regular enamel products may have been occasioned by the general acceptance of the Commercial Standard rather than a conspiratorial agreement. In effect the appellants wanted a charge that acceptance of the Standard indicated an intention to follow it. The trial judge gave a lengthy charge concerning the Commercial Standard in which he dealt with the nature of the Standard and its legal effect. In view of the comprehensive charge on this matter, we find no merit in appellants' argument.

Second, appellants assert they were prejudiced by the trial judge's failure to charge that the jury should consider whether the appellants tried to conceal their activities in evaluating whether illegal agreements were made. Assuming such a charge would have been proper, we do not believe the trial judge abused his discretion by not giving this charge on a point of at best tangential significance.

Third, appellants contend that the judge failed to charge on their specific theories of the case, viz. (a) he did not state "the defendants' theory that the January, 1963, vitreous china price increase came about as a result of the direct order of the . . . chief executive officer of Crane Co., and the subsequent independent decisions of the defendants"; and (b) that "the discontinuance of the manufacture of regular enameled cast iron bathtubs and lavatories was the result of the independent acceptances by the defendants of the Commercial Standard

and not of any illegal agreement." The judge's charge adequately covered these points in our view.[21]

Appellants' fourth contention with respect to the charge is that the court failed to accord any weight to appellants' economic evidence. In fact the court reviewed many of Dr. Beckman's conclusions and attributed them to the other appellants as well as Kohler. The appellants complaint, however that the judge unfairly charged on the permissible inferences to be drawn from pricing patterns. They contend that while he charged that similarity of pricing was some evidence of agreement though certainly not conclusive, he failed to charge that dissimilarity in pricing was some evidence of no agreement. While we agree with appellants that such a charge would be proper, in view of the court's lengthy review of Dr. Beckman's conclusions that Kohler's pricing established the absence of an agreement, we do not believe the court abused its discretion in this matter.

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21. He charged that the appellants contended:

"That economic conditions dictated the prices which they charged and even if there was uniformity with other competitors' prices . . .. such prices were the result of market forces and not the result of agreement."

He further charged that the appellants contended:

"That American Standard sought the change-over from regular enamel to acid-resisting enamel by means of the Commercial Standard, legally, as advised by counsel." (J.A. 1942a)

Similar instructions were given for Held and Kohler (J.A. 1944a), and Borg-Warner's contention that it was factually distinguishable from the other defendants on this issue was explicitly noted as well. (J.A. 1945a)

Appellants' final argument is that the trial judge erred in charging that "the things the defendants did and said at the time, may . . . be weightier than the things they say thereafter." And that "assertions of innocence by such officers may reflect partly legal as well as factual contentions." They claim this charge, in effect, negated the impact of the testimony of defense witnesses. Passing over the fact that the appellants apparently did not object to this charge, we find no error in giving this charge on this record. *United States v. Chas. Pfizer & Co.*, CCH Trade Reg. Rep., Para. 73, 1219 (2d Cir. 1970) is clearly distinguishable on its facts.

Appellants contend that they were prejudiced when the judge gave the indictment to the retiring jury without first deleting the names of those defendants who had pleaded *nolo contendere*. They allege this prejudice arose because the jury must necessarily have inferred that these persons and corporations had been convicted of the crime charged. Thus, they contend, those persons who were listed in the indictment which the defense did not call would be presumed by the jury to be unfavorable to the appellants. The court instructed the jury both at the very beginning of the trial and at some length during his charge that they were not to speculate concerning the guilt of co-conspirators not defendants then on trial but named in the indictment. We are convinced on this record that the appellants did not suffer substantial prejudice in this matter. We also decline to hold that the trial judge abused his discretion in allowing an unmodified version of the indictment to go to the jury, although we think the better procedure would have been to cover the names when defendants so requested.

Appellants' next claim is that they were denied a fair trial because the court gave the case to the jury on a Friday afternoon rather than on the following Monday. Their assertion that "the jury could only have concluded that it was required to reach a decision on Friday night . . . [and] must have inferred that the court was in a hurry to convict the defendants" is groundless. There is absolutely nothing in the record to suggest that the trial court conveyed to the jury a desire for a quick verdict.

Brady v. Maryland and Jenks Act Claims

Appellants also contend that the government attorneys did not fulfill their obligations under *Brady v. Maryland*, 373 U. S. 83 (1963), and the Jenks Act, 18 U. S. C. §3500, to furnish certain materials to them. *Brady* held that due process requires that the prosecution not suppress evidence favorable to an accused that is material either to guilt or to punishment; the Jenks Act provides that, after a government witness has testified on direct examination, the government must produce any statement of the witness in its possession "which relates to the subject matter as to which the witness has testified." The government maintains that it has no *Brady* material and that it has complied fully with its duties under the Jenks Act.

Appellants first assert that the failure of the government to disclose to them prior to trial the grand jury testimony of Raymond A. Pape constitutes a violation of the *Brady* rule. Pape was formerly Vice President and General Manager of defendant Crane's Plumbing, Heating, Air Conditioning Group. As we have indicated, he did not testify at trial and died shortly thereafter,

on July 15, 1969. During the pendency of this appeal the government furnished his grand jury testimony to appellants and to this court. Appellants argue that Pape's grand jury testimony was *Brady* material because Pape denied before the grand jury that any price-fixing agreement was reached at the March 28, 1963 Palm Beach Biltmore meeting. They consider the government's arguing to the jury that the HCA notes were written evidence of the illegal agreement made at the Palm Beach meeting "as grave as the 'deliberate deception of court and jury by the presentation of testimony known to be perjured.'"

We have carefully reviewed all of Pape's grand jury testimony, particularly those portions called to our attention by appellants, and are convinced that the government did not violate *Brady* by not producing it prior to trial. We note that while Pape denied that any formal price-fixing agreement[22] was made at Palm Beach he did admit that he had discussed prices with competitors at PFMA meetings. He also admitted that at least two months prior to their public announcement he knew what the new acid-resistant prices would be because he "had verbal discussions so that [he] was fairly certain what the other people would do." Grand Jury N. T.

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22. It should be pointed out that his denials seem in part to be based on an erroneous view of the law of conspiracy. See, e.g., Grand Jury N. T. 3830:

> ". . . I can't picture or remember anybody agreeing. I would say that I had the general idea when we left the meeting that these were the prices. Now, that is sort of the indirect feeling of an agreement, but I can't picture everybody just saying it. But I would say that my feeling leaving the meeting was that these were the prices."

3842-47. Moreover, as to the HCA notes, Pape unequivocally admitted that they were in his handwriting, and stated that "apparently someone was telling me what American Standard was going to charge," and that he felt the figures on the notes "represent new prices that American Standard was going to charge when they came out with their acid-resisting enamel." Grand Jury N. T. 3673-74. He further testified in part as follows about the HCA notes:

> "On this stationery that includes the Palm Beach Hotel, and there are several hotels on here, the one that I had previously felt that it couldn't have been Palm Beach, but after reading these [refreshment] documents, I feel that this could very well have been that early where I got this detail. This is the one that I say was American-Standard because it has American-Standard's specific prices and the names of the American-Standard tub." Grand Jury N. T. 3844.

On the whole, Pape's grand jury testimony was extremely incriminating and we cannot say that it contains any material exculpatory evidence.

Appellants also assert that the government's failure to reveal the contents or existence of certain statements in its possession by William E. Kraemer was a violation of *Brady* and the Jenks Act. Appellants first learned of the existence of these statements while this appeal was pending during the course of Kraemer's deposition which was being taken in certain civil treble damage actions against the indicted plumbing fixture manufacturers. Believing that these statements might contain *Brady* or Jenks material, appellants filed a motion in

this court seeking to compel the government to give them copies of these statements and to make them part of the record. By order of April 21, 1970 another panel of this court directed the government to produce the documents in question for *in camera* inspection by this panel. The government produced 16 documents pursuant to the April 21 order and represented that four other requested documents are not in its files and that it has no record that they ever were.

We have carefully examined all of the Kraemer statements. Most of them contain material that is exceptionally damaging to defendants. We have found no material exculpatory evidence in any of the statements. Moreover, we do not believe that appellants' mere speculation about materials in the government's files requires the district court or this court under *Brady* to make the materials available for their inspection. The possibilities for abuse in such a procedure are manifest. Cf. *United States v. Crisona*, 416 F.2d 107, 116 (2d Cir. 1969), *cert. denied* — U. S. — (1970); *United States v. Evanchik*, 413 F.2d 950, 952-53 (2d Cir. 1969); *United States v. Harris*, 409 F.2d 77, 80-81 (4th Cir.), *cert. denied* 396 U. S. 965 (1969). It follows that appellants' motion to have the Kraemer statements produced to them must be denied.

Appellants also contend that the Kraemer statements should have been produced at trial pursuant to the Jenks Act. They correctly point out, however, that "Mr. Kraemer was called as the final prosecution witness at trial but was not asked any questions by the prosecutor concerning alleged price fixing and merely

identifies briefly certain meetings of the PFMA."[23] He was not cross-examined by any of the appellants. His grand jury testimony and what the government represented to be his Jenks Act statements had been previously produced to appellants.

We have reviewed Kraemer's trial testimony and have examined the Kraemer statements with a view toward the application of the Jenks Act. Only one of the documents can be considered to "relate to the subject matter of the testimony of the witness." This document lists certain meetings of the PFMA, including three of the meetings the minutes of which Kraemer identified on the stand. There is no conflict between the dates shown on the list and the minutes Kraemer identified. Moreover, appellants at the time had copies of these minutes. Indeed, there was no dispute about the dates of the meetings in question at trial. Under these circumstances we are convinced that the government's failure to produce the document which related to Kraemer's testimony was harmless error. See *United States v. Kahaner*, 317 F.2d 459, 473 (2d Cir.), *cert. denied* 375 U. S. 835 (1963).

Separate Appeals

Daniel J. Quinn

The only argument raised by appellant Quinn in his separate brief is that the trial judge erred in refusing to permit his counsel to question him on direct examination about his health so that the jury could properly evaluate his demeanor. Quinn, who was 68

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23. Appellants' Response and Appendix to Government's Motion to Show Cause, p. 34a.

years old at the time of trial and in ill health, testified for two days on direct examination and seven days on cross-examination. Quinn asserts that to assist the jury in evaluating his demeanor and to take into account any effect his illness might have had on his demeanor, his counsel toward the close of direct examination asked him if he had ever been under a doctor's care for any serious health problem since his retirement. The court sustained the government's objection to the question, noting:

> "I have observed the witness all the way through too. I find nothing here that shows other than a very good witness, one who is responsive, one who is alert and shows no signs of any conduct because of any physical impasse.
>
> "This is a proper question presented to the court in the event only there is a conviction. But it is improper here because prejudice might outweigh the facts."

A trial judge in balancing the probative value of evidence against possible prejudicial effect is vested with broad discretion. The trial judge here observed the witness testify and concluded that the competing interests should be balanced in favor of excluding evidence of Quinn's poor health. On this record we cannot say that his ruling was an abuse of discretion.

Joseph J. Decker

The only argument raised by appellant Decker is that the trial judge erred in refusing to grant his motion for judgment of acquittal. We have already indicated, however, that the evidence of Decker's participation in

the fourth phase of the conspiracy, the price fixing concerning the changeover to all acid-resistant fixtures, was strong and certainly sufficient to support the jury's verdict.

Kohler Co. and Norman R. Held

Appellants Kohler and Held challenge the sufficiency of the evidence against them. We have already concluded that the evidence that Held participated in all four phases of the conspiracy was strong and certainly sufficient to support the jury's verdict. Kohler, however, argues that there was insufficient evidence to support a finding that any criminal activity of Held was done in the course of his employment with Kohler and within the scope of his authority. We disagree.

Kohler asserts that there was no evidence to support a finding that Held had authority to determine its prices. Kohler also emphasizes that it was against its rigid anti-fraternization policy for Held even to have social contact with its competitors. However, the government points out that Held was Kohler's sales manager and a director of the corporation. Moreover, even though Held testified that he had no actual authority to publish prices, he admitted that he was the official who recommended price changes to Kohler's chief executive and that he had unlimited authority over the company's discounting or "job pricing."

We think the jury could have found that Held's illegal actions were within the scope of his authority. There was testimony by Callanan that at one of the conspiratorial meetings Held claimed "that he was speaking for his company." It would also be reasonable to conclude

that Held's authority to recommend prices enabled him to commit Kohler to the conspiracy. Since Kohler adopted the conspiratorial prices and Held participated in meetings at which those prices were agreed to, the jury could reasonably have concluded that Kohler's price moves were taken as a result of the conspiracy. Moreover, the fact that Held may have been acting contrary to his instructions about fraternizing with competitors could hardly negate an inference that he was motivated at least in part by a desire to serve Kohler, and thus acting in the course of his employment. *See Restatement* (Second) *of Agency* §§228 *et seq.*

Kohler also asserts that it was prejudiced by the court's charge on a corporation's responsibility for its agents' acts and by its refusal to admit certain evidence concerning the rigor of its antitrust compliance policy. Assuming it was error to reject certain of Kohler's evidence concerning its corporate policy of strict compliance with the antitrust laws, we do not think Kohler was prejudiced in any way. The evidence was of marginal relevance and substantially cumulative.

As to the agency instruction, Kohler contends in substance that the court failed to say that the jury had to find both that the agents' acts were within his authority and within the course of his employment, that is, performed with the intention of benefiting the employer. In fact, the jury was so instructed.

The relevant instructions were as follows:

> "A corporation, itself, cannot attend a meeting or make decisions; it must act through agents, such as its officers, directors and employees. In order for a corporation to be responsible for the acts or state-

ments of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their employment or their apparent authority. Acts within the scope of employment are acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform. Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.

"When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.

"If you conclude that an agent of a defendant corporation, acting on behalf of the corporation and within the scope of his employment or his apparent authority, engaged in a price-fixing conspiracy, then it is no defense that the corporation had instructed its employees orally or in writing to comply with the antitrust laws and not to engage in price discussions with competitors."

Thus, the judge charged in substance that the corporation would be responsible if the agent acted "on behalf of the corporation and within the scope of his employment or his apparent authority." When this instruction

is viewed in light of the judge's definitions of "scope of employment" and "apparent authority," it is clear that the agency charge was not erroneous. We also note that one of appellants' points for charge stated that a corporation is criminally liable for an agent's unlawful acts done "within the scope of his authority"; no mention was made of the "course-of-employment" or "on behalf of" element. Finally, we point out that Kohler's counsel did not comply with the requirement of F. R. CRIM. PROC. 30 that, before the jury retires to consider its verdict, he state distinctly to the trial judge the matter in the charge to which he objects and the grounds of his objection. Kohler's counsel did not make the trial judge aware that he objected to the way these elements of corporate responsibility were presented and thereby give him a chance to conform his instruction to Kohler's wishes before the jury retired.

Kohler also asserts that the agency instruction was "oversimplified" because it "did not discuss the elements in the case which might aid the jury to determine whether anything done by Norman Held could have been done within the course of his employment by Kohler . . . ." We hardly think that the judge's failure to review the evidence on this point with the jury would be error. Moreover, the judge did review some of Kohler's contentions on the agency point earlier in his charge.

Kohler's final criticism of the agency instruction is that it did not state that the jury must be satisfied beyond a reasonable doubt that the elements for corporate responsibility were present. This contention is without merit. Near the beginning of his charge, the trial judge made clear that a defendant can be found guilty only if

the jury is satisfied beyond a reasonable doubt as to every essential element of the crime. The court was not required to reiterate the reasonable doubt requirement in the agency instruction. In any event, this claim was not called to the judge's attention in the Rule 30 colloquy.

Borg-Warner Corporation

Borg-Warner argues in its separate brief that the evidence of its participation in the conspiracy was insufficient to support a conviction. We have already indicated our conclusion to the contrary; there was strong evidence that Borg-Warner participated in all four phases of the conspiracy.

Borg-Warner's other separate argument is that it was prejudiced in certain respects by errors in the court's charge. Its first argument deals with the "missing witness" instruction that was given. Near the beginning of his charge, the trial judge gave the standard instructions on the presumption of innocence. In part, he charged as follows:

> "Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has a right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses of the prosecution. The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence."

However, since in their closing arguments counsel for all the parties except Kohler urged the jury to draw inferences from the failure of an opposing party to call

certain witnesses, the trial judge endeavored to provide general guidance to the jury in its consideration of such arguments by charging as follows:

> "There have been some arguments here on the failure of a party to produce a witness or evidence, as the case may be. Where a party, without satisfactory explanation, fails to call a witness, who is known to that party, who has knowledge of material facts and whose interest or prejudice is in favor of such party, or would likely be in favor of such party, the inference is that his or her testimony would not sustain the contention of the party, if the witness were called. Also, where evidence which would be properly part of a case, is within the control of one party or the other, whose interest would naturally be to produce it, and without satisfactory explanation, the party fails to do so, the jury may draw an inference that the evidence would be unfavorable, if that evidence was presented at the trial. If the testimony of the witness or the evidence would be merely cumulative, these rules would not apply. So, too, where witnesses are callable and evidence producible by any party, these rules do not apply.
>
> "Now, whether you apply these rules depends upon what you find the facts to be."

Borg-Warner questions the propriety of this charge. First, it suggests that "[t]he net effect of such an instruction was to say that the defendant should have come forward and proved its innocence" and thus the charge "directly conflicts with the presumption of innocence." The short answer to this claim is that a missing witness charge has long been accepted as appropriate

even in criminal cases. See *Graves v. United States*, 150 U.S. 118, 121 (1893). Indeed, the following passage from *Graves* was recently quoted with approval by this court in *United States v. Restaino*, 369 F.2d 544, 547 (3d Cir. 1966):

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." 150 U.S. at 121.

Accord, *Brown v. United States*, 414 F.2d 1165, 1166 (D.C. Cir. 1969).

Borg-Warner also argues that the missing witness charge should have contained specific references to those witnesses to whom it would be applicable and should have explained the prerequisites to its application more fully. On this record, however, we cannot say that the trial judge abused his discretion in charging as he did. Finally, Borg-Warner seems to suggest that the instruction could not be applied to it because unlike the other defendants, "[c]ounsel for Borg-Warner did not suggest to the jury that they should infer from the government's failure to call a particular witness that that witnesses' testimony would have been adverse." However, we note that it is entirely clear from the record that Borg-Warner's counsel did argue to the jury that the government did not call Borg-Warner employee, Ray Bair because his testimony would have been unfavorable.

Borg-Warner also argues that it was substantially prejudiced by the trial judge's incomplete statement of its "theory of the case" in his charge to the jury. In

particular, Borg-Warner emphasizes[24] that the trial judge should have specifically instructed the jury that it was relying on the testimony of government witness Morris H. Vereeke, Borg-Warner's Sales Vice President, that no price at Borg-Warner was ever established as a result of any information obtained from price discussions with competitors. Initially, we have some doubt whether Borg-Warner's suggested instruction on this point was an accurate characterization of Mr. Vereeke's testimony. In any case, we believe that the trial judge did not abuse his discretion in selecting the evidence he commented upon in his charge. Moreover, Borg-Warner's counsel clearly emphasized his reliance on Mr. Vereeke's testimony in his lengthy summation to the jury.

CONCLUSION

The government's evidence of price fixing by the appellants was compelling. We note in conclusion that the government presented eyewitnesses and co-conspirators who clearly implicated appellants in the crime and largely corroborated one another. As to all appellants but Decker, we have concluded that there is strong evidence of their participation in all four phases of the conspiracy. When it is remembered that evidence of a defendant's participation in any one phase of the conspiracy was sufficient for a conviction under the one-count indictment, it becomes clear that the cumulative effect of the government's case was overwhelming. As to appellant Decker, there was clear and convincing evi-

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24. This is the only argument on this point raised by counsel for Borg-Warner in his post-charge colloquy with the trial judge. See F. R. CRIM. PROC. 30.

dence of his participation in the fourth phase of the conspiracy.

It is true that we have found errors in a few instances but appellants are not entitled to hindsight perfection. Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction was entirely warranted from the evidence.

The judgments of conviction will be affirmed.

Judge Aldisert joins in this opinion insofar as it applies to the appellants, American Standard, Inc., in No. 18,182; Borg-Warner Corporation in No. 18,184; Joseph J. Decker, in No. 18,185; and Daniel J. Quinn, in No. 18,186.

ALDISERT, *Circuit Judge,* Dissenting in Appeal Numbers 18,183 and 18,187.

I would grant a new trial to Kohler Company, Appellant in No. 18,183, and Norman R. Held, Appellant in No. 18,187, because of what I consider improper and inflammatory conduct by the government attorney in the cross-examination of witness Held. This was fairly described in the majority opinion as references to "Kohler's purchase of guns, ammunition and tear gas, eviction of strikers, investigating the private lives of union officials, and other inflammatory topics."

The majority admit that "its potential for prejudice outweighed its evidentiary value," but conclude that because this incident occupied only one hour's time in a total of sixteen weeks it could not have affected the jury so as to deny a fair trial to these appellants. I disagree. I consider the improper cross-examination to possess a more sinister capacity.

Admittedly, what is posed is a close question. My brethren and I are in disagreement only as to where we place this error. I believe that it crosses the line and becomes so prejudicial as to justify the ordering of a new trial for these two defendants.

Even viewed from the most charitable vantage point, there was scant justification for the type of cross-examination, persisted in by the government and permitted to continue by the trial judge over the concerted objection of all defense counsel. Its ostensible claim to legitimacy, according to the trial judge, stemmed from a challenge to the credibility of the witness Held. But even here, it is most difficult, if indeed at all possible, to localize the specific statements in his brief rendition of the Kohler history which form the basis for the prolonged attack.

On direct examination he described early Kohler history, an account that ended in 1905. In response to the first question on cross-examination relating to the company's labor relations policies, he stated—and this is not challenged—that he was not in Kohler, Wisconsin, from 1954 to 1960, the years of the strike there. Yet he was subjected to a continuing barrage of "did-you-know" questions relating to a bitter chapter in industrial warfare, the facts of which, concededly irrelevant to the substantive issues of antitrust violation, were never presented testimonially other than from the questions of government counsel, and all of which had an explosive capacity for inflaming a Pittsburgh, Pennsylvania, jury.

Moreover, an examination of excerpts of this cross-examination set forth in the margin[1] discloses that it concludes with the astonishing statement of the government attorney: "And you understand . . . that the ques-

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1. Q. How were they between 1954 and 1960, Mr. Held?
   A. Well, first of all, I can't answer firsthand 1954 to 1960, because I was not on the scene.
   Q. Mr. Held, I asked you a question. Is it not a fact, sir, between 1954 and 1960 Kohler Company engaged in one of the longest and bitterest strikes in American history?
   A. Well, I wouldn't characterize it that way. I will agree with the length, but I won't agree with the bitter. Also involved here was an auto workers, union which had a contract that was geared to the production of automobiles. We are bathtub producers, that type of contract wouldn't work.
   Q. Then, you have no reason to buy guns and ammunition, do you, to break a strike?
   A. I don't know of any guns or ammunition.
   Q. Oh, you didn't know, sir, that during the course

tions which I have directed to you have absolutely nothing to do with any charge of the indictment that you have violated the law between 1962 and 1966?"

For the government to perpetrate and prolongate this slashing examination and then say that it had

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of the National Labor Relations Board hearings that Kohler Company was denounced for preparing for bargaining during the strike by purchasing guns, ammunition and tear gas?

• • •

A. Of my own knowledge, sir, I did not know.

• • •

Q. Do you know, sir, that in 1960 the National Labor Relations Board denounced your company for a number of unfair practices and that these practices included paying for and accepting from private detective agencies certain reports suggesting the possibility of bugging the union's hotel rooms during the course of the National Labor Relations Board hearing?

A. No, sir.

• • •

Q. Are you aware, sir, that in 1960 the National Labor Relations Board criticized Kohler Company for such practices among which were paying for and accepting from private detectives certain telephone checks and long distance calls from union headquarters?

A. No, I am not.

Q. Are you aware, sir, in the same hearing in 1960, that the same National Labor Relations Board denounced Kohler Company for hiring private detectives in that they investigated into the private life of the union's chief negotiator, together with the investigation of three international union officials?

• • •

Q. Mr. Held, did I not ask you more than ten minutes ago whether or not you read the hear-

"absolutely nothing to do with any charge of the indictment" raises the serious question of the very real purpose of the examination. It is particularly significant that the trial was held in the Western District of Pennsylvania, a community historically and currently the center of organized labor activity. With a jury drawn from this philosophical environment, the potential for

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> ings and the opinion of the National Labor Relations Board, and did you not answer, "Yes, but that was a long time ago"?
>
> • • •
>
> Q. Certainly, sir. In the same 1960 opinion of the National Labor Relations Board, are you aware, sir, that, in their opinion, criticism was leveled against Kohler Company because of the submission of a formal detailed plan calling, in part, for a system of secret plant informants and a comprehensive investigation of all new employees?
>
> A. No, I am not aware of that.
>
> • • •
>
> Q. Do you know, sir, whether or not the United States Court of Appeals found that Kohler Company engaged in anti-union espionage during the strike?
>
> A. I don't know. I can't answer that without reference.

The chambers conference was then held at which time the court was advised by counsel, "The course of inquiry which the government has chosen to pursue into this matter has not been into a logical examination of what probative value, if any, this matter might arguably have. But, it has been to select certain fragmentary details from the reported decisions of the National Labor Relations Board, and by the Court of Appeals for the District of Columbia, about the various legal proceedings which resulted from that strike, and to take those details which are most likely to inflame and prejudice the jury, and to make it impossible for them to act in a calm and

prejudice following an hour-long injection of collateral labor-baiting activities into an antitrust prosecution cannot be minimized.

My difference with the majority going only to the effect of this admittedly improper cross-examination, it does not become necessary to rehearse at length the appropriate principles of law.

I have concluded that the examination was designed to and did create an abhorrent image of these appellants,

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dispassionate manner with respect to the issues in this case." After a lengthy chambers conference, represented by twenty-one pages of the court record, the government attorney resumed the cross-examination the next day:

Q. You will recall yesterday afternoon that you were asked certain questions concerning Kohler's strike which occurred between 1954 and 1960. Do you recall that, sir?

A. Yes, sir.

Q. Did Kohler, as a company, ever own any of the homes in which the workers lived?

A. On occasions for short periods of time, as I recall. I would have definite information on that, Mr. Fricano [government counsel].

* * *

Q. And when the strike occurred, sir, Kohler Company served eviction notices on the strikers, didn't it, and actually evicted some of them from company-owned houses and from the hotel?

The cross-examination continued for ten additional pages of court record until the final statement by government counsel:

Q. And you understand, of course, do you not, Mr. Held, that the questions which I have directed to you along these lines have absolutely nothing to do with any charge in the indictment that you violated the law between 1962 and 1966?

United States v. *Beno*, 324 F.2d 582 (2d Cir. 1963), and did degrade them in the eyes of the jury, *United States* v. *Provoco*, 215 F.2d 531 (2d Cir. 1954).

Traditionally, this circuit has been most zealous in prohibiting the introduction of collateral matters in a criminal prosecution. In *United States* v. *Jacangelo*, 281 F.2d 574 (3 Cir. 1960), Judge Hastie declared that "admission of evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged." In our recent case of *United States* v. *Shartner*, . . . F.2d . . . (3d Cir. No. 17,747, 1970), passing reference to the defendant's criminal record was held not to be reversible error solely because "it was not emphasized and was in a sense oblique." We said: "With this we are in accord albeit somewhat reluctantly. But the prosecuting attorney should not have been permitted to read that portion of the statement proving Shartner's prior conviction and the Trial Judge should have prevented such an occurrence. If it were not for the peculiar circumstances surrounding this incident we would hold it to be reversible error."

I believe that an improper cross-examination of at least one hour's duration, which persisted beyond an overnight recess, must be considered as more than an oblique reference—irrespective of the length of the trial.

Because I would remand for a new trial as to them, I would also hold that the Beckman charts supporting the oral testimony of Dr. Donald Beckman should be admitted, as well as Kohler Exhibit 132.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

No. 66-295 Criminal

UNITED STATES OF AMERICA

v.

BORG-WARNER CORPORATION

On this 12th day of August, 1969, came the attorney for the government and the defendant appeared in person, and by counsel Clayton A. Sweeney, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and Verdict of Guilty of the offense of Engaging in unlawful combination and conspiracy in restraint of trade violation of 15 USC 1 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine of $50,000.00 and a proportionate share of the costs which the Clerk of Court will determine.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

LOUIS ROSENBERG,
United States District Judge.

JAMES H. WALLACE, JR.,
Clerk.

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,184

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION; KOHLER CO.; CRANE CO.; WALLACE-MURRAY CORPORATION; UNIVERSAL-RUNDLE CORPORATION; RHEEM MANUFACTURING COMPANY; BORG-WARNER CORPORATION; BRIGGS MANUFACTURING COMPANY; PLUMBING FIXTURE MANUFACTURERS ASSOCIATION; JOSEPH J. DECKER; DANIEL J. QUINN; NORMAN R. HELD; ROBERT E. CASNER; JOHN B. BALMER; STANLEY S. BACKNER; ROBERT J. PIERSON, JR.; and GEORGE W. KELCH

BORG-WARNER CORPORATION, Appellant
(D. C. Criminal No. 66-295)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ and ALDISERT, *Circuit Judges* and HIGGINBOTHAM, *District Judge*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

Judgment.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed August 12, 1969 be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

September 23, 1970

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,182 to 18,187, inclusive

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.
AMERICAN STANDARD, INC.,
Appellant in No. 18,182
KOHLER COMPANY,
Appellant in No. 18,183
BORG-WARNER CORPORATION,
Appellant in No. 18,184
JOSEPH J. DECKER,
Appellant in No. 18,185
DANIEL J. QUINN,
Appellant in No. 18,186
NORMAN R. HELD,
Appellant in No. 18,187
(D. C. Criminal No. 66-295)

Nor Petition for Rehearing

Present: HASTIE, *Chief Judge*, and SMITH, ALDRICH, GIBBONS, *Circuit Judges*, and FREEDMAN, *District Judge*.

The petitions for rehearing filed by Appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

COLLINS J. SEITZ
Circuit Judge

Dated: November 3, 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1047

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1048

BORG-WARNER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1049

NORMAN R. HELD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1050

KOHLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–72a [1]) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1970, and petitions for rehearing were denied on November 3, 1970. The petitions for writs of certiorari were filed on December 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in affirming jury verdicts convicting petitioners of participation in an antitrust price-fixing conspiracy, the court of appeals applied the proper standard of appellate review.

2. Whether petitioners' right of confrontation under the Sixth Amendment was violated by application of the federal co-conspirator exception, and other well-recognized exceptions, to the hearsay rule.

3. Whether the court of appeals correctly held that cross-examination of petitioner Held concerning the

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[1] The court's opinion appears identically at pages 1a–72a in the appendices of the petitions in *Nos.* 1048, 1049, 1050. It also appears at Pet. App. No. 1047, 7a–78a. For convenience, the United States will use the text of the opinion set forth in Nos. 1048, 1049 and 1050 and refer to this simply as "Pet. App."

As used herein "J.A." refers to the four-volume Joint Appendix to the main briefs in the court of appeals. "E" refers to the three-volume "Exhibits to Joint Appendix"; "T" refers to the trial transcript.

1954 strike against Kohler Company did not constitute prejudicial error as to Held and Kohler, when considered in the context of the entire trial, and the strength of the government's case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution provides:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *.

Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of the title to be illegal shall be deemed guilty of a misdemeanor * * *.

STATEMENT

On October 6, 1966, a grand jury returned a single count indictment charging eight corporations, eight high-ranking employees of those corporations and a trade association with conspiring to fix the prices of enameled cast iron and vitreous china plumbing fixtures, in violation of Section 1 of the Sherman Act

(Pet. App. 2a–3a).[2] The indictment stated that at meetings held in several cities the defendants agreed to raise prices on enameled cast iron and vitreous china plumbing fixtures, to limit the maximum allowable discounts on those fixtures, and to discontinue the production of regular enameled cast iron fixtures, leaving production only of higher-priced acid resistant fixtures; and that the defendants had carried out their agreement (Pet. App. 2a–4a).

Eleven of the seventeen defendants pleaded *nolo contendere* and were sentenced on their pleas (Pet. App. 5a). The petitioners chose to stand trial. After a sixteen-week jury trial, all six petitioners were convicted (Pet. App. 5a–6a). The court of appeals affirmed (Pet. App. 66a).[3]

The conspiracy consisted of four phases, interrelated as to timing and participants, yet possessing sufficient distinctiveness to merit separate discussion.

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[2] The defendants other than the petitioners were Crane Company and its vice-president, Robert Casner; Universal-Rundle Corp. and its vice-president, Stanley Backner; Rheem Manufacturing Co. and its vice-president, Robert Pierson; Wallace-Murray Corp. and its president, John Balmer; Briggs Manufacturing Company; George Kelch, President of petitioner Borg-Warner's Ingersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA). (Pet. App. 2a–3a).

[3] The affirmance was unanimous as to petitioners American Standard, Borg-Warner, Decker, and Quinn. Judge Aldisert dissented from the affirmance of the convictions of Kohler Company and Held. All the affirmances were as to all aspects of the conspiracy except for petitioner Decker: as to him, the court of appeals affirmed on a finding of sufficient evidence regarding the conspiracy to eliminate regular enameled fixtures, and did not decide the sufficiency question regarding other aspects of the conspiracy.

A. THE AGREEMENT TO INCREASE BATHTUB PRICES

In October and November, 1962, the seven defendant corporations producing enameled cast iron plumbing fixtures all published identical, increased prices on high volume enameled cast iron bathtubs (Pet. App. 8a).[4] This uniform price increase was the direct result of an agreement reached by the sales officials of the corporations in a meeting held on September 17, 1962, at petitioner Quinn's room at the Sheraton-Chicago Hotel (Pet. App. 8a). Petitioners Quinn and Held were there, as was defendant Keleh of Borg-Warner; high-ranking officials of Crane, Universal-Rundle, Rheem and Wallace-Murray also participated (Pet. App. 8a–9a). As the court of appeals noted, "[t]here was substantial 'eyewitness' testimony concerning price discussions and agreements at this gathering" (Pet. App. 9a).

For example, Mr. Callanan, who had participated in the meeting for Rheem, testified not only that there had been a discussion of specific bathtub prices, but also that there had been agreement as to what the new prices would be.[5] Similarly, Mr. Cannon of Wallace-

[4] All seven corporations published new special prices, which quoted prices applicable to purchases of high-volume staple items in accord with certain specified conditions. The bathtubs involved in this phase of the conspiracy were such items. (Pet. App. 8a).

[5] "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?

"The Court: If anything.

"The Witness: The prices as reflected in my bulletin of November 2, 1962 [which were identical to the prices of all the other manufacturers], were the prices that I came out of that room with that understanding." (Pet. App. 9a).

Murray reported to his superior of the Sheraton-Chicago agreement that there had been a discussion of prices and "* * * that there was a tentative agreement to increase prices * * *." (Pet. App. 10a).

B. THE AGREEMENT TO MAINTAIN AND INCREASE THE PRICES OF VITREOUS CHINA PLUMBING FIXTURES

The conspirators who met in petitioner Quinn's hotel room on September 17, 1962, were not only concerned with raising bathtub prices; they also wanted to put into effect a general increase in the prices of vitreous china fixtures. They agreed that higher prices were a necessity, but they feared that an increase at that time would not hold if the "short-line" manufacturers[4] kept their prices at current levels (Pet. App. 11a–12a). However, on November 20, 1962, petitioners Quinn and Held, along with Kelch of Borg-Warner and high-ranking officials of Crane and Rheem, met at the Shoreham Hotel in Washington (Pet. App. 12a). Rheem's vice-president, Pierson, testified that Casner of Crane announced that Crane would soon raise prices to a specific level. Discussion of these prices followed and, according to Pierson, "It was my opinion when I left that people probably would follow the lead of Crane in some form or another" (Pet. App. 13a).

Crane did announce a 7 percent across-the-board in-

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[4] In the trade, a "short-line" manufacturer is one that produces only the most commonly used vitreous china fixtures. Petitioners American Standard, Kohler and Borg-Warner (and all the other indicted corporations except Briggs) were "full-line" companies.

crease on all china fixtures on January 14, 1963. Shortly thereafter all the indicted corporations except Borg-Warner raised their prices to the level of Crane's (Pet. App. 13a).[7] The conspirators, fearing that this increase would not hold firm, met at the Waldorf-Astoria Hotel in New York on February 7, 1963, "* * * to try to maintain the new prices" (Pet. App. 13a). Petitioners Decker, Quinn, and Held were present, as were Keleh of Borg-Warner and several other high-ranking sales officials (Pet. App. 13a–14a). Bonnett of Wallace-Murray testified that the men discussed new china prices and that petitioner Quinn stated that "* * * the general consensus was that the new prices would—we would try to maintain the new prices" (Pet. App. 14a). Five days later, Borg-Warner raised its prices to conform with those of the other conspirators.

C. THE AGREEMENT TO LIMIT MAXIMUM DISCOUNTS FROM WHOLESALER NET PRICES

The conspirators further agreed that they each would limit the discounts from wholesaler net prices to a maximum of 15 percent for enameled cast iron and 20 percent for vitreous china fixtures (Pet. App. 15a). Once again, agreement was reached at the September 17, 1962, meeting at Quinn's Chicago-Sheraton

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[7] Briggs had had no representative at the Shoreham Hotel meeting, but it increased its prices only after its vice-president, Betz, had discussed the price increase with Crane officials and agreed to raise its prices to the agreed levels. (Pet. App. 13a).

hotel room. Once again, the proof of agreement came from eyewitness testimony. Callanan of Rheem testified that he came away from the meeting "of the opinion that other people would be using the same structure" (Pet. App. 16a). The "other people" were the "other members who were in the room that evening," and the "structure" was "[f]ifteen per cent on iron and twenty per cent on china" (Pet. App. 16a). Cannon of Wallace-Murray confirmed these percentages in his testimony; he noted that in the discussion he had agreed to verify actual prices quoted from his competitors, in order to prevent building contractors from playing off one manufacturer against another and getting a better discount than the 15 percent and 20 percent allowed (J.A. 27a; 292a–294a). When the conspirators met on February 7, 1963, at the Waldorf-Astoria Hotel, they reaffirmed their earlier agreement to limit discounts. Bonnett of Wallace-Murray testified that petitioner Quinn reported to him that there had been a discussion of discounts and a "tentative discussion or agreement" to limit the discounts to 15 percent on cast iron and 20 percent on vitreous china (Pet. App. 16a–17a). Bonnett assured Quinn that his company "would try to adhere to those discounts" (Pet. App. 17a).*

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*Bonnett, upon returning to Pittsburgh, instructed his subordinate Cannon not to discount from wholesaler net prices more than those percentages on those products (J.A. 305a–306a).

D. THE AGREEMENT TO ELIMINATE REGULAR ENAMELED CAST IRON PLUMBING FIXTURES AND TO INCREASE THE PRICES OF ACID RESISTANT FIXTURES

Another aspect of the conspiracy was the agreement to stop production of regular enameled cast iron fixtures and impose an increased price structure on the acid resistant fixtures which would remain in production. Regular enameled cast iron fixtures were important to the conspirators' business. They accounted, for example, for more than $20,000,000 in gross annual sales at American Standard (Pet. App. 17a). Competition from steel and plastic fixtures, both of which are acid-resistant, was intense (Pet. App. 17a). In order to implement an industry decision to discontinue so fundamental a line of fixtures, however, strong protective cover was needed (JA 507a, 479a–482a). The device selected was to change the Enameled Cast Iron Plumbing Fixtures Commercial Standard by having it provide for acid-resistant finish only, and then cite the revision to justify discontinuation of regular enamel. Publication of the revised standard would also serve as the signal for the defendants' scheme to become operational (JA 470a–472a, 403a, 405a, 418a; 394a–395a).[9]

The conspirators agreed upon the elimination of regular cast iron and the new prices for acid resistant cast iron at a meeting on March 28, 1963, in Quinn's

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[9] The Commercial Standard is a recorded voluntary standard of the trade published by the U.S. Department of Commerce (E 158). Since the standard is purely voluntary, it could not require the conspirators to discontinue the use of regular enameled cast iron fixtures.

room at the Palm Beach Biltmore Hotel (Pet. App. 18a)." Pierson of Rheem testified that petitioners Quinn, Decker and Held were present, as were Kelch of Borg-Warner and several other key officials of other corporations (Pet. App. 18a). Pierson testified most explicitly of this meeting:

> A. The discussion resolved [sic] around the specific timetable that would occur in this change from—in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.
>
> Q. Were specific prices mentioned during the course of this meeting?
>
> A. Yes.
>
> • • • • •
>
> Q. What was decided at this meeting, if anything, Mr. Pierson?
>
> A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.* [Pet. App. 18a–19a; emphasis added by court of appeals.]

As the court of appeals found, Cannon of Wallace-Murray confirmed Pierson, testifying that the participants had discussed the "proper philosophy" of pricing in the new all acid-resistant market and that they had decided upon certain prices (Pet. App.

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[10] The record shows that the conspirators had frequently discussed the need to eliminate regular enamel and to restructure the prices of acid-resistant enamel before: at the Sheraton-Chicago meeting in September, 1962 (JA 371a, 554a–555a, 477a–478a); at meetings at the Shoreham Hotel in November, 1962 (JA 435a–436a, 442a–444a, 458a–459a; E4); at the Americana Hotel in New York (JA 376a–377a).

19a). Callanan also confirmed the price discussion and the specificity of the prices selected (Pet. App. 19a). He also testified that "There was a general discussion that the timing of the thing would tie in with the issuance of Commercial Standards" (JA 368a–369a)."

In order to reaffirm their Palm Beach agreement, the conspirators met two months later at the Airport Hotel in Pittsburgh on May 15, 1963 (Pet. App. 20a). Decket, Quinn, and Held were present, as were Kelch of Borg-Warner and officials of Crane, Wallace-Murray, Rheem, and Universal-Rundle (Pet. App. 20a). Bonnett of Wallace-Murray testified that they discussed specific prices and that "It was my understanding when I left the meeting that the prices would generally be on this level" (Pet. App. 20a). The somewhat general nature of the discussion was due to the fact that this meeting was to reaffirm the decision taken earlier at Palm Beach. As Cannon of Wallace-Murray testified, at the time of the Pittsburgh meeting he already knew the price structure to be announced in July and August of that year (JA 403a).

The conspirators held a final, confirmatory meeting in Quinn's room at the Waldorf-Astoria Hotel on

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[11] The purported justification for removing non-acid-resistant enamel from the Commercial Standard was that it was no longer an industry-wide item. The PFMA Enameled Cast Iron Standards Committee so stated on February 7, 1963 (E328 ¶ 5). As the defendants themselves admitted at trial (JA 553a–554a, 556a, 478a, 516a, 391a–392a), this representation was untrue. In turn, the Commerce Department on June 7, 1963, issued a new, revised standard (effective July 10, 1963) that "for the first time made acid resistant cast iron enamel fixtures the industry standard" (Pet. App. 17a–18a).

June 26, 1963 (Pet. App. 20a). In the words of Pierson, who attended, there was "a general review of the proposed plan on this product line and the pricing that was related thereto" (Pet. App. 20a). A copy of the announcement that American Standard intended to issue concerning the changeover and the new prices was discussed by the group (Pet. App. 20a–21a). On July 1, 1963, American Standard made this announcement public: within two months all the other indicted cast iron manufacturers had announced their discontinuance of regular enameled cast iron fixtures and new, higher prices for acid resistant fixtures (Pet. App. 18a).

The court of appeals stated: "The government's evidence of price fixing by the appellants was compelling * * * the cumulative effect of the government's case was overwhelming" (Pet. App. 65a–66a). As the court noted, the government's case largely relied on the consistently incriminating eyewitness testimony of the petitioners' own co-conspirators (Pet. App. 66a), and showed an extensive and successful conspiracy to fix prices on enameled cast iron and vitreous china plumbing fixtures.

ARGUMENT

1. THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW

In many respects this is a typical antitrust criminal conspiracy case: there are several defendants, the trial consumed sixteen weeks, and the record of trial runs to more than 10,000 transcript pages and 900 exhibits.

In at least one respect, however, this case is decidedly atypical. Here, the government's proof rested not primarily on inferences to be drawn from circumstantial evidence of parallel business behavior but on direct testimony of witnesses who were themselves participants in illegal price discussions and agreements. The appropriate standard for appellate review in this type of case was long ago established by this Court: where the evidence against the defendants is strong, jury verdicts will not be reversed for errors unless the reviewing court is persuaded that misconduct of the trial prevented the jury from determining the case on a dispassionate consideration of the evidence. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240. See also *Glasser* v. *United States*, 315 U.S. 60, 83.

The court of appeals correctly applied this standard in discharging its difficult review function here. To be sure, it found and identified errors; total absence of error in a lengthy and hard-fought trial of this magnitude and complexity would be surprising indeed. But after a painstaking review of the entire record, and thorough consideration of all the many issues raised by petitioners here, the court concluded that:

> Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction

was entirely warranted from the evidence. [Pet. App. 66a] "

This conclusion was in full conformity with the court's duty under the federal harmless error statute.[11] It is true that the court spoke of the strength of the government's case; indeed the court found the government's proof "overwhelming" (Pet. App. 65a). But the court made plain that it had viewed "the record in its totality"; under the doctrine of harmless error an appraisal of the strength of the government's case is essential. Even error of constitutional scope—and there was no such error in this case—may be harmless in the face of overwhelming government proof. *Harrington* v. *California*, 395 U.S. 250, 254. *A fortiori*, overwhelming government proof may render ordinary error harmless.

We submit that petitioners had a full and fair trial, and that the claims they seek to present here were fully considered and correctly rejected by the court below under the appropriate standard of review.

II. THERE WAS NO VIOLATION OF THE PETITIONERS' SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Petitioners request this Court to declare the co-conspirator hearsay exception a denial of the right of

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[11] Except as to petitioners Kohler Co. and Held, and with reference to only a single issue to be discussed *infra*, this determination was unanimous.

[12] 28 U.S.C. 2111: "On the hearing of any appeal • • • the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

confrontation (Pet. No. 1047, 15–16). The co-conspirator exception to the hearsay rule has been part of federal law for well over a century. *United States* v. *Gooding*, 12 Wheat. 460. As the court of appeals observed, this Court has held it not to be a violation of the Sixth Amendment. *Dutwak* v. *United States*, 344 U.S. 604. See, also, *Clune* v. *United States*, 159 U.S. 590; *Delaney* v. *United States*, 263 U.S. 586.

Petitioners do not dispute this precedent, but they claim that the co-conspirator hearsay exception is "in conflict with the rationales" of *Bruton* v. *United States*, 391 U.S. 123, and *Evans* v. *Dutton*, 400 F. 2d 826 (C.A. 5) (Pet. No. 1047, 15). But *Bruton* expressly did not involve the co-conspirator exception to the hearsay rule, 391 U.S. 123, 128, n. 3, and this Court, since the instant petitions were filed, has reversed the Fifth Circuit's decision in *Dutton* v. *Evans*, 400 U.S. 74.

In *Dutton* v. *Evans*, *supra*, the Court held that Georgia's co-conspirator exception to the hearsay rule was not a violation of appellee's right of confrontation under the Sixth and Fourteenth Amendments. While the validity of the federal evidentiary rule was not in issue, 400 U.S. at 82, the federal rule is considerably more restrictive of co-conspirator hearsay than the Georgia rule whose application to Evans was held constitutional.

Moreover, looking to the impact of the co-conspirator hearsay admitted in this case, one is struck by its insignificance. The court of appeals, after a thorough

examination," concluded that the instances in which declarations of a co-conspirator who did not testify were received "amounted at best to a handful * * *. The sum of its weight was extremely small and insignificant when the record is considered as a whole" (Pet. App. 38a). Any confrontation issue in this case is raised in a context of harmless error beyond a doubt. See *Dutton* v. *Evans, supra; Harrington* v. *California, supra; Latwak, supra.*

B. There is no merit to the contention (Pet. No. 1047, 16–17) that the decision of the court below conflicts with decisions of the Sixth and Ninth Circuits. In both *Townsend* v. *Henderson*, 405 F. 2d 324 (C.A. 6) and *O'Neil* v. *Nelson*, 422 F. 2d 319 (C.A. 9), certiorari granted, No. 336, O.T. 1970, November 9, 1970, confessions of one co-defendant, made while in police custody [15] and incriminating to another co-defendant, were received in violation of the rule of *Bruton* v. *United States*, 391 U.S. 123. The question before the courts of appeal in each of those cases was whether

[14] Petitioners' contention that the court of appeals rejected their confrontation claims "[w]ithout particularized analysis of the evidence in question" (Pet. No. 1047, 15) is inaccurate. As the court's opinion makes clear (see, *e.g.*, Pet. App. 37a, 38a), the court examined the record with care in considering the confrontation issue and with little assistance from petitioners, who "have made little attempt to document their claim by specific page references to the record" (Pet. App. 37a, n. 15). Petitioner's contention (Pet. No. 1047, 16, n. 1) that co-conspirator hearsay was the only evidence of Quinn's agreement to fix china prices prior to American's January 1963 increase is inaccurate. See Pet. App. 17a–21a.

[15] The disputed declaration in *Townsend* was made to a prison official while the declarant was kept in solitary confinement, and was held to be an involuntary confession. *Id.* at 327–328.

the constitutional error in the prosecution's admitted violation of *Bruton* was cured by the opportunity which each appellant had at trial to cross-examine the co-defendant. Since in each instance the co-defendant denied ever making the confession, the courts of appeal held that cross-examination was not useful and the *Bruton* error loomed too large to be harmless. *Townsend* v. *Henderson*, 405 F. 2d at 328–329; *O'Neil* v. *Nelson*, 422 F. 2d at 321–322.

By contrast, the testimony to which the petitioners now object was fully admissible against all the defendants under well-developed rules of evidence and decisions of this Court. Bonnett on direct related his conversation with Quinn in a Waldorf-Astoria hotel room; Quinn told him that he and the other conspirators had agreed to limit discounts (JA 302a–303a). This declaration was admissible against Quinn as an admission by a party, see Wigmore on *Evidence* (3d Edition), § 1048, and against his co-conspirators under traditional principles approved by this Court. *Supra*, p. 15.[16]

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[16] Petitioners' observation (Pet. No. 1047, 16) that Quinn denied this conversation with Bonnett is in essence a complaint that the jury chose to believe Bonnett, not Quinn. Petitioners' contention (Pet. No. 1047, 16, n. 2) that "prosecution witnesses were allowed to give opinion evidence without being able to recall the facts upon which their opinions were based" is without merit. Of the four witnesses to whose testimony petitioners refer, two (Quinn and Held) were *defense* witnesses; the other two, Callanan and Pierson, dealt in specifics and were subject to vigorous cross-examination. See, for example, JA 215a–224a; 228a–229a.

C. Petitioners' contention that the admission of the HCA (or Pape) notes denied their Sixth Amendment right to confrontation (Pet. No. 1047, 10–14) is unfounded. These notes, (E168–178) written by Raymond Pape on stationery of the Hotel Corporation of America ("HCA"), were found stapled together in the files of Crane Co., Pape's employer and a defendant (Pet. App. 31a). The HCA notes "echoed figures and statements" which Quinn had written on an internal American Standard worksheet dated March 1, 1963 (Pet. App. 37a; E146). These two documents were part of the government's proof that the conspirators had met on March 28, 1963, at the Palm Beach Biltmore (an HCA hotel) and had agreed on the basis of American Standard's projections, to eliminate regular enamel and fix prices on acid resistant enamel (Pet. App. 30a). Pape, the author of the notes, was seriously ill with heart disease at the time of the trial—indeed he died of heart failure shortly after the trial—and accordingly, although he was technically available to testify, the government promised not to call him if it could possibly avoid doing so (Pet. App. 31a, n. 11). The United States did not call Pape as a witness but introduced his notes instead.

The main argument [11] petitioners now advance is that the confrontation clause requires the government

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[11] Petitioners also contend that in upholding the admission of the notes the court of appeals "* * * erroneously equated the right to confrontation with the hearsay rule contrary to this Court's express rejection of such an equation in *California* v. *Green*, 399 U.S. 149 (1970)" (Pet. No. 1047, 14). The

to produce a witness to testify to any fact, so long as it is incriminating and so long as the witness is literally available (Pet. No. 1047, 14). Such a position, which would exclude on constitutional grounds virtually all extra-judicial declarations of an available witness, was not accepted by this Court in *California* v. *Green*, 399 U.S. 149,[18] and is inconsistent with the recent decision in *Dutton* v. *Evans*, 400 U.S. 74. In *Dutton*, declarant was available to testify, though he probably would have claimed the privilege against self-incrimination. The prosecution did not call him to the stand and used instead a hearsay declaration; this Court found no violation of the defendant's right to confrontation. Here the government introduced Pape's written notes without calling him as a witness to avoid dangerous strain upon a man in demonstrably precarious health.[19]

Finally, we note, the Pape notes related only to the fourth aspect of the conspiracy. Even if one assumes

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court of appeals did not make such an equation. The court did hold that the notes were not hearsay (Pet. App. 38a–39a), but only in response to petitioners' arguments below that they were (Pet. App. 37a–38a). The rejection of this argument, made briefly again in this Court (Pet. No. 1047, 12), was correct. See, *e.g.*, McCormick, *Evidence* (1954), 463–466.

[18] Mr. Justice Harlan advanced a related, but less sweeping position, bottomed on due process grounds, in *California* v. *Green*, *supra*, at 186–187 (concurring). He has now rejected this prior view, *Dutton* v. *Evans*, 400 U.S. 74, 93 (concurring).

[19] Petitioners, of course, could have called Pape had they thought his testimony would be useful to them. He was, after all, an executive of a co-defendant corporation. Presumably they feared the impact of his testimony, or else they recognized what the government earlier recognized: that a man this sick should be spared the ordeal of testifying if it could possibly be done.

they pertained to some other time or place than the Palm Beach meeting, proof of the other three aspects of the conspiracy remains unimpaired. The notes would nonetheless remain cogent and proper proof of American Standard's participation in this aspect of the conspiracy. And the remaining proof *e.g.*, pp. 9–12, *supra*, would be more than adequate to establish the complicity, as well, of the other defendants.

D. The essentially related claim that the prosecutor violated his duty under *Brady* v. *Maryland*, 373 U.S. 83, by failing to produce the transcript of Pape's grand jury testimony before trial (Pet. 1047, 19–20; Pet. 1048, 7–11; Pet. 1049, 13–18) is unsound. Although petitioners filed a blanket, pretrial motion for production of "all material helpful or exculpatory" to them (J.A. 25a), the motion was withdrawn upon the prosecutor's assertion that he was aware of no such material in his possession. Never during trial did petitioners indicate pecific interest in the Pape transcript. Never was the trial judge asked to review the prosecutor's judgment that this or any other document was not subject to production under *Brady*.

In their opening brief on appeal, petitioners asserted for the first time that introduction of Pape's notes without putting Pape on the stand suggested that Pape's grand jury testimony had been suppressed to conceal inconsistencies between it and the government's theory of authorship and significance of the notes. The government is satisfied that the transcript was not producible under *Brady;* we be-

lieve, moreover, that appellants gave up their right to make the claim on appeal by not affording the trial judge an opportunity to pass on their contentions in the first instance. Nevertheless, we voluntarily produced the transcript to appellants and to the court of appeals, in order to help rebut sweeping allegations of prosecutor misconduct.

Petitioners briefed and argued below their claim, renewed here, that isolated passages of the transcript contained arguably exculpatory material. The court of appeals, after consideration of the entire transcript, fully vindicated the prosecutor's judgment. It had little trouble concluding that Pape's testimony was "extremely incriminating" and contained no "material exculpatory evidence" (Pet. App. 54a). Under these circumstances it cannot be said that the prosecutor and the court below misconceived the prosecutor's responsibility under *Brady* v. *Maryland*.

III. THE DECISION BELOW CREATES NO CONFLICT AMONG THE CIRCUITS REQUIRING RESOLUTION NOW BY THIS COURT

Petitioner American Standard contends (Pet. No. 1047, 20–22) that the decision below "reflects" a conflict among the circuits concerning the proper interpretation of 28 U.S.C. 1732(a) and the weight to be given by a jury to a defendant's statements at trial and at the time he committed the crime. These contentions are erroneous.

A. American Standard offered as evidence internal company correspondence and memoranda containing

information from its field offices regarding the prices supposedly charged by its competitors (Pet. App. 42a). The trial court, however, rejected the company's claim that these were "business records" within the meaning of 28 U.S.C. 1732, and it excluded them as hearsay (Pet. App. 43a). The court of appeals sustained this ruling, holding that the reports were primarily based on information from "sources whose trustworthiness could not be ascertained from the documents themselves" and that American Standard was often not a party to the transactions that the exhibits concerned (Pet. App. 43a).[20]

In so holding, the court relied on *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (C.A. 9), certiorari denied, 356 U.S. 975. The court said that it was "not inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 148 (6th Cir. 1960)" (Pet. App. 43a). A careful reading of *Continental Baking*, however, reveals that the Sixth Circuit did not dispute or reject *Moore*. Rather, it distinguished that case as having been "predicated" on the lack of showing of a regular procedure for transmittal of the disputed reports about competitors; in the

[20] The court's judgment that these particular documents were untrustworthy was well grounded in fact. These "business records" were punctuated with rumors and unsubstantiated reports from undisclosed sources. See, for example, the gossipy nature of AS 61, 66, or 88 (American Standard Exhibits). Furthermore, American's own district manager, O'Connell, admitted that he received reports which contained incorrect information (T. 6066) and that he forwarded reports of competitors' activities whether or not he knew them to be true (T. 6023).

case before it, Continental "had an established policy" providing for just such transmittal. *Continental Baking Company* v. *United States*, 281 F. 2d 137, 148 (C.A. 6).[21] In so distinguishing *Moore*, the Sixth Circuit may well have interpreted it erroneously; indeed we believe the decision below reflects a sounder reading of *Moore*. But there is no dispute among the circuits concerning the central premise of *Moore*—that documents can be admissible as business records under 28 U.S.C. 1732 only if there is a basis for reasonable assurance that the information they contain is trustworthy and reliable. Thus no substantial disagreement is presented which requires resolution by this Court.

B. The court of appeals approved a jury instruction on the weight to be given to testimony of witnesses who were defendants or officials of defendant corporations and who denied entering into the illegal agreements; the court in *United States* v. *Chas. Pfizer & Co.*, 426 F. 2d 32, 40 (C.A. 2), disapproved a similar instruction.[22] We believe that the Third Circuit was

[21] Petitioners' citation to *Hanley* v. *United States*, 416 F.2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910, does not advance its argument (Pet. No. 1047, 21, n. 1). *Hanley* was based squarely on *Continental Baking* and its treatment of *Moore*. *Id.*, at 1168. The petition for a writ of certiorari denied in *Hanley*, No. 888, O.T. 1969, was based almost exclusively on the asserted conflict.

[22] The government has filed a petition for a writ of certiorari in *Pfizer*.

correct in this case. The instruction[23] was premised on the well-settled proposition that what constitutes an illegal "agreement" under the Sherman Act is a mixed question of law and fact. See, *e.g.*, *United States* v. *Gypsum Co.*, 333 U.S. 364, 396.

But this is not the case for resolution of any conflict there may be between the circuits. The court below correctly noted that petitioners failed to object to this instruction as given (Pet. App. 51a), and thus failed to preserve the issue for appeal. Fed. R. Crim. P. 30.

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[23] The trial court's full instruction on this point was as follows:

> You must, obviously, give due and deliberate thought to this testimony, and ultimately give to it such weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination and conspiracy as it has been given to you in these instructions, recalling among other things, that the final answer to the central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time, may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the alleged conspirators did not believe that they were violating the law or intend to commit such a violation.
>
> This is by no means to suggest to you that you overlook or reject the sworn testimony of the corporate defendants' officers. That is for your judgment, not mine. The point being made here is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you [J.A. 1954a–1955a].

IV. THE PROSECUTOR'S QUESTIONS CONCERNING THE KOHLER STRIKE DID NOT DEPRIVE THE PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL

The prosecutor opened his cross-examination of petitioner Held with some questions based upon the officially-reported findings of the National Labor Relations Board, concerning the 1954 strike at Kohler Co. Held, a Kohler vice-president and director, on direct examination had not mentioned the strike, while tracing the history of the company and emphasizing its beneficence to its workers (Pet. App. 27a).[24] The court of appeals majority held that Kohler and Held had "invited some such inquiry" (Pet. App. 27a) and that Kohler's counsel had "opened the door further" by urging that another defendant's threshold objection to the cross-examination be overruled (Pet. App. 26a, 27a).[25] The court nevertheless concluded that the trial judge should have terminated the line of inquiry prior to completion because "its potential for prejudice outweighed its evidentiary value" (Pet. App. 27a). But considering the minimal impact of a brief interlude in the lengthy trial, weighed against the strength of the government's case, the majority found that the incident did not deny petitioners a fair trial (*Ibid.*).

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[24] Kohler's counsel had foreshadowed this approach in his opening statement when he emphasized Kohler's sense of responsibility as the principal employer in the county and its devotion to full employment, even at the cost of selling at a loss (JA 1603a–1604a).

[25] Indeed, the prosecutor first sought to avoid injection of these considerations into the case by unsuccessfully objecting to the entire line of examination on direct as immaterial (Pet. App. 24a; JA 1734a).

Accepting the view of the court of appeals that the cross-examination was excessive, it was on sound ground in concluding that in the circumstances the error could not have had sufficient prejudicial effect to warrant reversal. The entire episode took at most an hour of a trial that lasted sixteen weeks (Pet. App. 27a). Equally important, this bit of cross-examination took place several weeks prior to the conclusion of the trial, and, in keeping with Kohler's request, the matter was not even adverted to in the summations or the jury charge (Pet. App. 27a). The dissenting judge conceded that "what is posed is a close question" (Pet. App. 67a). The court of appeals carefully examined the place of this brief episode in the context of the entire trial and the strength of the evidence of petitioners' guilt, and concluded that the error was harmless.[28]

V. OTHER ISSUES RAISED BY THE PETITIONS DO NOT WARRANT REVIEW BY THIS COURT

Kohler challenges the jury instruction on criminal responsibility of a corporation for the acts of its agents (Pet. 1050, 3). The instruction, quoted at Pet. App. 59a–60a, was an accurate restatement of the law governing acts of agents within the scope of their

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[28] The claim of petitioner Borg-Warner that it, too, was prejudiced by this episode is groundless (Pet. No. 1048, 11–12). Of course, this cross-examination never mentioned Borg-Warner, nor hinted at any involvement by it in the Kohler strike. Moreover, the trial judge clearly and carefully instructed the jury that this part of the cross-examination did not involve any defendants except Held and Kohler (JA 1749a–1750a, 1766a).

authority and the course of their employment, as the court below held (Pet. App. 58a–61a). Kohler's main claim throughout these proceedings has been that its sales manager, Held, was acting beyond his authority in making price-fixing agreements with competitors, because Kohler has a firm policy against such practice (Pet. 5–6). But it is the corporation which benefits directly from such illegal activities, and for this reason it is well settled that a corporation may not insulate itself from antitrust liability merely because its agent's activities may be contrary to corporate regulations. *Standard Oil Company of Texas* v. *United States*, 307 F. 2d 120, 127 (C.A. 5); *United States* v. *Armour & Co.*, 168 F. 2d 342, 343 (C.A. 3). A contrary rule, by affording an easy means for evasion of responsibility, would seriously weaken the deterrent effect of the antitrust laws. See *United States* v. *Uniroyal, Inc.*, 300 F. Supp. 84, 95 (S.D.N.Y.).

Kohler also complains that it was denied a fair trial by the exclusion of certain documentary economic evidence (Pet. 1050, 6–8). One exhibit purported to show pricing data outside the indictment period; Kohler's own economic expert, Dr. Beckman, conceded that studies which *were* admitted formed a sufficient basis for the conclusions to which he testified (J.A. 1527a). Another excluded exhibit purported to show some 650 discounts in excess of the agreed-upon limits; this exhibit was not only misleading (Pet. App. 44a) but also cumulative in light of substantial testimony that such discounts had been granted. (*Ibid.*; J.A. 1444a, 1454a.) Indeed, the trial judge offered Kohler an opportunity to introduce the invoices which sup-

posedly supported the exhibit (J.A. 1485a), but petitioner apparently did not think the matter of sufficient importance to do so.

Borg-Warner's contention (Pet. No. 1048, 22–25) that the court of appeals erroneously affirmed the trial court's "missing witness" charge is based on an error of fact. Contrary to petitioner's statement that "Borg-Warner had put in no case" (Pet. No. 1048, 23), Borg-Warner put in a case of its own, by introducing several exhibits (see, *e.g.*, E316) and taking a witness as its own on cross-examination in order to go beyond the scope of direct examination (JA 739). On such a record, the missing witness instruction was entirely proper. *Graves v. United States*, 150 U.S. 118.

Similarly without merit are Borg-Warner's accusations of improper conduct by the trial judge and the prosecutor (Pet. No. 1048, 13–14). The court of appeals examined the record with meticulous care and concluded that Judge Rosenberg had behaved with fairness through a long and wearing trial (Pet. App. 22a–23a). As to the prosecutor's closing remarks, the court held that any prejudice was insignificant in light of the trial court's corrective instructions (Pet. App. 29a–30a).

These and other arguments made in the various petitions were raised and exhaustively considered in the court below. To the extent that we have not discussed any argument, the careful and comprehensive opinion of the court of appeals affords an adequate answer.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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